S. HRG. 100-436

RETAIL COMPETITION ENFORCEMENT ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 430

A BILL TO AMEND THE SHERMAN ACT REGARDING RETAIL COMPETITION

APRIL 23, 1987

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RETAIL COMPETITION ENFORCEMENT ACT—S. 430

THURSDAY, APRIL 23, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:04 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Howard Metzenbaum (acting chairman) presiding.

Also present: Senators Humphrey, Specter, and Grassley.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. The hearing will come to order.

This hearing is about prices that consumers pay, prices for clothing, appliances, children's toys, and hundreds of other household items. For over 70 years, the courts have held that retailers have the freedom to offer their customers a discount off the manufacturer's suggested retail price.

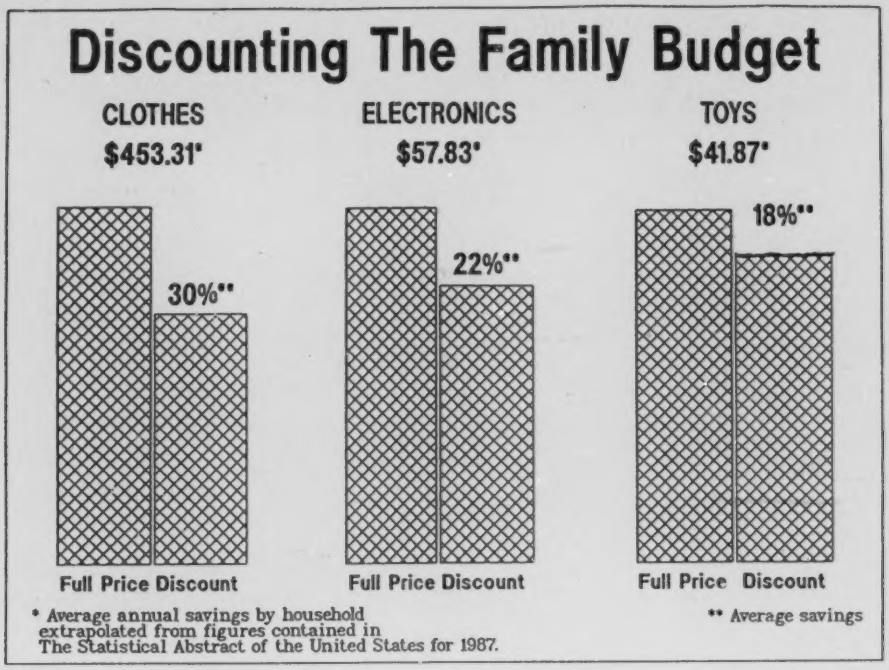
In Cleveland, this may mean the difference between paying $39.99 or $22.47 for a Sony Walkman, a difference of 40 percent. Or in Columbus, it may mean a savings of 29 percent on a pair of Fisher Price roller skates that cost $16.99 in a full-price store and $11.99 in a discount store. Retailers' right to offer a discount has saved consumers literally billions of dollars.

Along with Senators Rudman, Simon and Bradley, I have introduced legislation to make retailers' freedom to set their own prices a permanent part of the antitrust laws. A price comparison conducted by my staff in Ohio shows that consumers pay an average of 18 percent to 30 percent less in discount stores than in full-price retail stores.

The survey concludes that consumers can pay an average of 30 percent less for clothes, 22 percent less for electronic equipment, and 18 percent less for toys. In all, an average American household can save about $453.31 on clothes, $57.83 on electronic equipment, and $41.87 on toys each year by shopping in discount stores.

At this point, I will place in the record the compilation of facts and figures that was put together by my staff in Ohio.

[Information follows:]



Discounting the Family Budget

During the week of March 23, 1987, the staff of Senator Metzenbaum's Ohio offices conducted a survey of the price of the same products in discount stores compared to nondiscount stores. The survey focused on the prices of a representative selection of clothing, electronic equipment, and children's toys. The staff visited a representative group of discount and retail stores in Cincinnati, Cleveland, Columbus, and Toledo. The prices collected in the survey are regular, non-sale prices. 1/

The results of the survey are as follows: On average, a consumer could save 30% on clothes, 22% on electronics, and 18% on children's toys by shopping for selected items in discount stores rather than in nondiscount stores. 2/ Application of these findings to figures contained in The Statistical Abstract of the United States for 1987 indicate an average annual savings, by household, of about $453.31 for clothes, $57.83 for electronics, and $41.87 for toys. 3/

Notes

1/ The products and the stores surveyed were selected to determine how much a household could save by shopping for consumer goods in discount stores.

2/ See attached list of products and prices. These percentages were calculated by subtracting the discount price from the nondiscount price, and then dividing the remainder into the nondiscount price.

3/ The approximate annual average household savings was calculated in the following manner: the average percentage saving (see footnote 1) for clothing (30%) was multiplied by the personal consumption expenditures for "clothing and accessories" in 1985 ($132.2 billion)(see The Statistical Abstract of the United States for 1987, Table No. 710, page 422). This number, $39.660 billion, was divided by the number of American households in 1985 (87,489,000)(see The Statistical Abstract of the United States for 1987, Table No. 63, page 45) to get a total of $453.31 per household. The same procedure was followed for appliances (using the figure in Table 710, supra, for personal consumption expenditures for "kitchen and other household appliances" - $23.0 billion) and for toys (using the figure in Table 365, page 211, of the 1987 Statistical Abstract of the United States for 1985 entitled personal consumption expenditures for "nondurable toys and sport supplies" - $20,350,000).

DISCOUNT - NONDISCOUNT CONSUMER PRICE SURVEY

PRODUCT	NONDISCOUNT PRICE	DISCOUNT PRICE
CLOTHING:		
C'EST JOLI CULOTTES BY LAURA	L.S. AYRES- $10.99	GOLD CIRCLE- $7.99
A LITTLE ANGEL INFANT DRESS	L.S. AYRES- $15.00	GOLD CIRCLE- $12.99
ARROW DOVER MAN'S SHIRT	LAZARUS- $20.00	MARSHALL'S- $10.99
VAN HEUSEN MAN'S SHIRT	LAZARUS- $12.90	MARSHALL'S- $9.99
OAK BLUFF WOMAN'S BLOUSE	L.S. AYRES- $18.00	FASHION FACTORY OUTLET- $7.99
VILLAGER WOMAN'S SUIT	L.S. AYRES- $128.00	FASHION FACTORY OUTLET- $65.99
HEALTH TEX BOY'S SHIRT	MAY CO.- $10.00	BURLINGTON- $6.75
CARTER'S INFANT SNAP SHIRTS	HIGBEE'S- $5.00	MARSHALL'S- $3.98
ARROW MEN'S LONG SLEEVE SHIRT	MAY CO.- $24.00	MARSHALL'S- $10.99
LEVI'S MEN'S CHINOS	HIGBEE'S- $22.00	SCHACKS MEN'S STORE- $20.00
HANES MEN'S BRIEFS	MAY CO.- $7.99	MARC'S DISCOUNT STORE- $4.47
LEVI'S LADIES JEANS	LAZARUS- $30.00	THE CLOTHES STORE- $25.99
NIKE MEN'S T-SHIRT	LAZARUS- $11.00	THE FINISH LINE- $9.99
LIZ CLAIBORNE DENIM BLOUSE	MADISON'S- $42.00	BURLINGTON- $31.75
HANES V-NECK UNDERSHIRT	PENNEY'S- $12.50	BURLINGTON- $7.56
ELECTRONICS:		
COBRA CORDLESS PHONE	HIGBEE'S- $189.99	FRETTER'S- $128.95
PANASONIC EASA-PHONE ANSWERING MACHINE	HIGBEE'S- $129.99	TOKYO SHAPIRO- $88.90
PANASONIC DOUBLE CASSETTE RADIO	MAY CO.- $99.99	FRETTER'S- $66.95
FISHER VHS STEREO	MAY CO.- $549.99	FRETTER'S- $448.98
SONY WALKMAN AM/FM RADIO	HIGBEE'S- $39.99	U.S. MERCHANDISE- $22.47
POLAROID SPECTRA SYSTEM CAMERA	DODD PHOTO- $179.95	U.S. MERCHANDISE- $124.97
HOOVER CONCEPT ONE	HIGBEE'S- $279.95	K-MART- $219.00

OSTER 14 SPEED BLENDER	PACKARD HARDWARE- $47.99	U.S. MERCHANDISE- $34.97	
HAMILTON-BEACH FOOD PROCESSOR	LAZARUS- $59.99	SERVICE MERCHANDISE- $53.72	
PANASONIC TOASTER	LAZARUS- $16.99	SERVICE MERCHANDISE- $14.83	
RIVAL ELECTRIC CAN OPENER	LAZARUS- $14.90	SERVICE MERCHANDISE- $12.97	
SUNBEAM 12 SPEED MIXMASTER	LAZARUS- $89.99	SERVICE MERCHANDISE- $69.86	
SONY 13" COLOR TV	LAZARUS- $369.00	SONA- $339.00	
SONY G-1500 STEREO	LAZARUS- $549.00	SONA- $495.00	
KODAK DISC 3600 CAMERA	ELDER BEERMAN- $37.99	BEST PRODUCTS- $27.87	
KODAK TELE DISC CAMERA	ELDER BEERMAN- $49.99	BEST PRODUCTS- $35.93	
POLAROID SUN 660 CAMERA	ELDER BEERMAN- $79.99	BEST PRODUCTS- $69.86	
POLAROID SPECTRA CAMERA	ELDER BEERMAN- $169.99	BEST PRODUCTS- $128.97	
NIKON ONE TOUCH CAMERA	ELDER BEERMAN- $179.99	BEST PRODUCTS- $139.97	
TEXAS INSTRUMENT CALCULATOR TI 36	ELDER BEERMAN- $27.99	BEST PRODUCTS- $19.94	
TEXAS INSTRUMENT CALCULATOR 1766 II	ELDER BEERMAN- $9.99	BEST PRODUCTS- $7.97	
GENERAL ELECTRIC POCKET RADIO	ELDER BEERMAN- $26.99	BEST PRODUCTS- $18.86	
GENERAL ELECTRIC SUPER RADIO	ELDER BEERMAN- $64.99	BEST PRODUCTS- $44.74	
SONY WALKMAN RADIO CASSETTE	ELDER BEERMAN- $49.99	BEST PRODUCTS- $39.74	
SONY AM/FM STEREO DUAL CASSETTE RECORDER	ELDER BEERMAN- $139.99	BEST PRODUCTS- $117.83	
MEYERS 8 PC. COOK & LOOK COOKWARE	ELDER BEERMAN- $89.99	BEST PRODUCTS- $79.94	
PRESTO 4 QT. PRESSURE COOKER & CANNER	ELDER BEERMAN- $32.00	BEST PRODUCTS- $24.97	
SUNBEAM OSKAR FOOD PROCESSOR	ELDER BEERMAN- $79.00	BEST PRODUCTS- $59.82	
CUISINART SUPER PRO FOOD PROCESSOR	ELDER BEERMAN- $259.99	BEST PRODUCTS- $219.94	
BLACK & DECKER CUP-AT-A-TIME COFFEEMAKER	ELDER BEERMAN- $24.99	BEST PRODUCTS- $19.97	
BLACK & DECKER SPACEMAKER BREW-STARTER	ELDER BEERMAN- $69.99	BEST PRODUCTS- $49.92	

SUNBEAM FREEDOM CORDLESS HAND MIXER	ELDER BEERMAN- $39.99	BEST PRODUCTS- $34.97
FARBERWARE ELECTRIC 12" SKILLET	ELDER BEERMAN- $69.95	BEST PRODUCTS- $57.97
FARBERWARE ELECTRIC 7 QT. WOK	ELDER BEERMAN- $69.99	BEST PRODUCTS- $59.94
FARBERWARE 4 SLICE TOASTER	ELDER BEERMAN- $39.99	BEST PRODUCTS- $32.97
TOASTMASTER UNDER-CABINET 4 SLICE TOASTER	ELDER BEERMAN- $59.99	BEST PRODUCTS- $44.92
POLLENEX DIAL MASSAGE SHOWERHEAD	ELDER BEERMAN- $24.98	BEST PRODUCTS- $19.97
HELEN OF TROY- THE HOTS HAIR DRYER	ELDER BEERMAN- $14.99	BEST PRODUCTS- $9.97

Toys:

MY LITTLE PONY TWICE AS FANCY	THE TOY WORKS- $5.79	SWALLENS- $5.49
FISHER-PRICE PUFFALUMPS	THE TOY WORKS- $23.99	SWALLENS- $19.99
POGO BAL	SEARS- $14.99	GOLD CIRCLE- $13.99
WWF WRESTLER TOY	LAZARUS- $4.99	TOYS 'R US- $3.97
MAGIC MOVES BARBIE	LAZARUS- $16.99	TOYS 'R US- $14.97
FISHER-PRICE WATCH	LAZARUS- $11.99	TOYS 'R US- $9.97
FISHER-PRICE ROLLER SKATES	LAZARUS- $16.99	TOYS 'R US- $11.99
POUND PUPPIES NEW-BORN	LAZARUS- $9.99	TOYS 'R US- $6.94
FISHER-PRICE BASEBALL SET	LAZARUS- $14.99	TOYS 'R US- $13.99
G.I. JOE COBRA ENEMY	LAZARUS- $3.59	TOYS 'R US- $2.69
RAMBO FIGURE SET	SEARS- $7.99	TOYS 'R US- $5.97
FISHER-PRICE MAJIC VAC	ELDER BEERMAN- $19.99	BEST PRODUCTS- $14.97
FISHER-PRICE BUBBLE MOWER	ELDER BEERMAN- $19.99	BEST PRODUCTS- $16.97
FISHER-PRICE TRIKE	ELDER BEERMAN- $29.99	BEST PRODUCTS- $24.84
COLECO CABBAGE PATCH DOLL TABLE-MATE	ELDER BEERMAN- $19.99	BEST PRODUCTS- $16.97
COLECO CABBAGE PATCH DOLL CYCLE STROLLER	ELDER BEERMAN- $17.99	BEST PRODUCTS- $14.97
PARKER BROTHERS MONOPOLY GAME	ELDER BEERMAN- $10.99	BEST PRODUCTS- $8.92

Senator METZENBAUM. Now, with respect to a comparison of prices, we bought the same Health Tex boys' shirts in a discount store and in a full-price store. We paid $6.75 in the discount store and $10 in the non-discount store. A family with young children could save about 30 percent by buying this shirt in a discount store.

I am frank to say that I looked at the two shirts. I compared them. I looked for the labels, I looked for the details, I looked for everything I could possibly find that might be different about the two shirts and I could find nothing that was different about the two shirts except the price differential of $3.25, $10 as against $6.75.

Now, that is good news, but with a little work the news could be even better. Changes to improve the current situation are contained in S. 430, a bill introduced with bipartisan support.

First, S. 430 codifies the 75-year-old doctrine that price-fixing between manufacturers and retailers is per se illegal. Codification of this principle is necessary because the Administration has not only failed to enforce it, but has also intervened in court cases to overrule it.

That is an unbelievable fact of life that an Administration that talks about free competition and that talks about the free enterprise system would go into court in order to make it possible for manufacturers to maintain prices at a higher level than that which others are willing to sell them at.

While a bipartisan coalition of Senators and Representatives prohibited this intervention since 1984, the Department of Justice's court activity in previous years has confused the courts.

S. 430 eliminates the confusion and sends a clear message to the courts that vertical price-fixing is per se illegal.

Second, the bill clarifies the burden of proof for a discount retailer who claims he was cut off by his supplier for charging low prices. The law on this issue is in such disarray that it provides no guidance and needs to be settled.

I look forward to working with my colleagues on both sides of the aisle to enact this legislation to give consumers the break to which they are so much entitled.

At this point I wish to place a statement of Senator Thurmond and the text of S. 430 in the record.

[Material follows:]

PREPARED STATEMENT OF SENATOR STROM THURMOND

Mr. Chairman: The issue of resale price maintenance and vertical price fixing is an interesting one for me, because I was strongly in favor of repealing the Fair Trade laws in 1976, and I also believe that discounting retailers provide a benefit to consumers. I believe that vertical price fixing ought to be, as it is, illegal.

Having said that, however, I must say that I have serious concerns with the bill before us. In *Monsanto* v. *Spray-Rite,* the Supreme Court recently reaffirmed that vertical price fixing conspiracies are *per se* illegal, so that is not the issue before us. The issue is whether to change the evidentiary standard required to establish that a manufacturer stopped dealing with a retailer as the result of a price fixing conspiracy. Manufacturers may lawfully select those with whom they will deal, and they may choose to stop dealing with retailers for many lawful reasons. I am concerned about the way this bill would shift the burden of proof where price fixing conspiracy claims are made. I also wonder whether it is wise or necessary to codify standards of "per se" illegality.

I will be interested in the views of our witnesses on all sides of the issue.

Thank you, Mr. Chairman.

100TH CONGRESS
1ST SESSION

S. 430

To amend the Sherman Act regarding retail competition.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 2, 1987

Mr. METZENBAUM (for himself, Mr. RUDMAN, Mr. BRADLEY, and Mr. SIMON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the Sherman Act regarding retail competition.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "The Retail Competition Enforcement Act of 1987".

SEC. 2. The Sherman Act is amended by redesignating section 8 and any references to section 8 as section 9 and by inserting between section 7 and section 9, as herein redesignated, the following new section:

"SEC. 8. In any civil action based on section 1 or 3 of this Act, including an action brought under section 5 of the Federal Trade Commission Act, which alleges a contract,

combination, or conspiracy to set, change, or maintain a price level, evidence that a person who sells a good or service to the claimant for resale—

"(1) received from a competitor of the claimant, a communication regarding price competition by the claimant in the resale of such good or service, and

"(2) in response to such communication terminated the claimant as a buyer of such good or service for resale, or refused to supply to the claimant some or all of such goods or services requested by the claimant,

shall be sufficient to raise the inference that such person and such competitor engaged in concerted action to set, change, or maintain a price level, for such good or service in violation of such section.

"(b) In any civil action based on section 1 or 3 of this Act, including an action brought under section 5 of the Federal Trade Commission Act, which alleges a contract, combination, or conspiracy to set, change, or maintain a price level, the fact that the seller of a good or service and the purchaser of such good or service entered into an agreement to establish the resale price of such good or service shall be sufficient to establish that such seller and such purchaser engaged in concerted action to set, change, or maintain the price level of such good or service in violation of such section.".

Senator METZENBAUM. Our first witness today is accompanied by members of her family, and I must tell you that it gives the Chairman a particular sense of pleasure and delight to see these four quadruplets and their older brother with us today.

We want to invite you back often, Ms. King, to testify whenever you want. If you want, you can stay home; just send the kids. We love them; we think they are beautiful. We are very happy to have you and Kenzie and Reece and Erik and Trevor and Miller. It is a great family.

It is a pleasure to have you with us and we would be very happy to have your statement at this point, and if the children speak out a bit, we will include that in the record as well. Please proceed.

STATEMENT OF A PANEL CONSISTING OF SUSAN KING, ACCOMPANIED BY TREVOR, KENZIE, ERIK, MILLER, AND REECE KING; AND SHARON LEVETT

Ms. KING. Thank you. It is nice to be here. Well, as a mother of five, every mother wants her children to look nice and I am no exception to that.

Senator METZENBAUM. Do you want to pull that mike a little closer to you?

Ms. KING. It surprises me, the amount that they do charge in regular stores for clothing. I find that I can find clothes as they are wearing now in a discount store and they all, I think, look nice. I could go to a regular store and pay a lot more money for them, but I do not see the sense in that with 5 children.

I shop for their clothes for many reasons, to save money. Number two, at this age they go through their clothes so quickly that I cannot see spending a lot of money on blue jeans that they will outgrow in several months.

Diapers alone, in the beginning with four infants, we were going through 350 diapers a week, over $100 a week on diapers alone. Now, it is down to $30 a week, which still is a lot of money, but I shop for the best price of diapers. I find the same diapers at a discount store at a lot less than I do at a supermarket or a drug store.

So for that alone, clothing and diapers, I can testify here today that I do use a lot of clothes and use a lot of diapers, and I want to have them look nice without spending a lot of money.

TREVOR KING. Me, too.

Senator METZENBAUM. I want to include in the record that Trevor said "me, too."

Ms. KING. Toys, also, Senator, if I can touch on that—I have five birthdays in two days.

TREVOR KING. Definitely. [Laughter.]

Ms. KING. And it is almost like Christmas twice a year, birthdays and Christmas, and the toys that I find at discount stores are of equal quality as I would go buy at a regular toy store, so that in itself saves a lot of money.

Senator METZENBAUM. Ms. King, if you could not buy in discount stores, what adjustments might you have to make in your purchase of clothing and toys for your children?

Ms. KING. Well, it would be to the point where—and I still rely on a lot of hand-me-downs, but when we have somewhere that we

would all like to go and look nice, it would mean that my kids would not have that many nice clothes, firsthand clothes.

Senator METZENBAUM. Might it also impact on your food budget?

Ms. KING. Oh, sure, sure. We would have to cut back on a lot of places, and toys, also. It is hard to deprive your children of the toys that are hot, you know, the items that are hot, and especially when I have four at one time. It is hard to say, well, I cannot buy it because, you know, there are four of you and your brother would want one, too. There are five toys, usually the same thing. So it does help to go to the discount toy stores and try and get just what the boy up the street would have for my children.

Senator METZENBAUM. Do you feel that in terms of convenience to your home and quality of the sales help—how do they compare? Is one as good as the other?

Ms. KING. I think so. I think the people in discount stores are very friendly; they are willing to help. I think the quality of both items in discount stores and regular stores are of equal quality.

Senator METZENBAUM. Thank you very much, Ms. King.

Ms. KING. Thank you, Senator.

Senator METZENBAUM. You are very welcome to remain or whatever you are comfortable about doing, but it has been a real pleasure to have you and your family here today.

Ms. KING. Thank you, sir.

Senator METZENBAUM. Thank you very much.

Ms. KING. Thank you.

Say goodbye.

TREVOR KING. Bye.

Senator METZENBAUM. Bye, Trevor. Thanks for being with us. You were a good witness, Trevor. Your mom was okay, too.

TREVOR KING. I know.

Senator METZENBAUM. You take care of your little sister and brothers, will you, Trevor?

TREVOR KING. Okay.

Senator METZENBAUM. Okay.

TREVOR KING. Bye.

Senator METZENBAUM. Where are you going to go now, Trevor? Are you not going back to my office to get some candy?

TREVOR KING. Yes.

Senator METZENBAUM. Okay. [Laughter.]

Ms. Levett, we are happy to hear from you.

Ms. LEVETT. I also have five children. My oldest is 21; I have twins that are 20; I have one 18 and one 15. I am at the point where now I am kind of getting a little freedom here.

I have one that is graduating from high school and one that will still be in high school, and they are at the point where they have a lot of peer pressure. Kids at that age have to keep up with the neighborhood kids or the kids at school.

In order for me to be able to maintain my entire household budget, discount stores are my main source of shopping.

Senator METZENBAUM. Wait one moment.

[Pause.]

Senator METZENBAUM. My apologies, Ms. Levett.

Ms. LEVETT. That is all right.

Senator METZENBAUM. You go right ahead.

Ms. LEVETT. Okay. I find that we have a store in Cleveland that is called—if I may say, we have a Value City, and what they do is they buy out the goods from your bigger stores, like, say, they have had a fire or something like that, or they are going out of business. They will buy all of the name-brand designer things and sell them at a very low discount price.

I had the opportunity to buy—the ladies here might know what I am talking about—Bandolino shoes for women. They are 100 percent leather, very good shoes. Normally, they would sell for at least $65 and up, and I bought them for $9.99. I do not get very much opportunity to shop for myself with the kids, so I find this to be very handy.

I do not know what I would do without the discount stores. It would just be almost impossible.

Senator METZENBAUM. What adjustments would you have to make in your own lifestyle—give me the range of the age of your children again.

Ms. LEVETT. Twenty-one, two that are 20, one 18 and one 15. At that age, the kids like to go a lot and they have a lot of different activities. A lot of these activities would definitely be cut out, okay. They are into sports and they need a lot of sports equipment and this sort of thing. That would also be cut out.

There would be different things they would not be able to participate in because I would not be able to afford it.

Senator METZENBAUM. Do you work?

Ms. LEVETT. Yes.

Senator METZENBAUM. And are you the sole supporter of your family?

Ms. LEVETT. Yes, I am.

Senator METZENBAUM. And are any of the children now working and bringing home any income?

Ms. LEVETT. Yes. My son has a job after school and my oldest has a job, and what they do is they sort of buy the little things that they want themselves other than what I can give to them. So it is helping out now, but before then it was kind of hectic.

Senator METZENBAUM. Where do you live in Cleveland?

Ms. LEVETT. Cleveland Heights.

Senator METZENBAUM. Do you have any idea how much money you save a year by shopping in discount stores?

Ms. LEVETT. I would have to save a good maybe $1,000, $1,500.

Senator METZENBAUM. And are you satisfied with the kind of service you get in discount stores and the fact that they are close enough to you to be able to shop?

Ms. LEVETT. Yes, I am because I am a person that does not really like to shop, I imagine, because I have always had to shop for so many. So I like to go in, get what I have to get, and come out.

If you have a sales clerk following you around the store, they have a tendency to try to direct you to something that you did not come in there for. In the regular stores, you have a point of sale register, meaning you have to pay for every item right there where it is at.

It is better if you can just get a cart, get what you have to get, go to the register and you are gone. It saves a lot of time.

Senator METZENBAUM. Very good. Well, thank you very much, Ms. Levett. We are very grateful to you for joining us today and your testimony is very helpful. Thanks a lot.

Ms. LEVETT. Thank you.

Senator METZENBAUM. Our next witness is—I was going to say Chairman Oliver, but he is testifying in the House and will be here shortly.

Our next panel is Mr. Robert Abrams, Attorney General of New York, on behalf of the National Association of Attorneys General; Mr. Mark Silbergeld, of the Consumers Union, Washington, DC; and Professor Harry First, New York University Law School, New York.

The committee has a 5-minute rule. We hope you will confine your remarks to 5 minutes, and your entire statements will be included in the record.

Mr. Abrams, do you want to proceed?

STATEMENT OF A PANEL CONSISTING OF ROBERT ABRAMS, ATTORNEY GENERAL, STATE OF NEW YORK, ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ACCOMPANIED BY LLOYD CONSTANTINE, CHIEF, ANTITRUST BUREAU, OFFICE OF THE ATTORNEY GENERAL, STATE OF NEW YORK; MARK SILBERGELD, DIRECTOR, WASHINGTON OFFICE, CONSUMERS UNION OF THE UNITED STATES, INC.; AND HARRY FIRST, PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. ABRAMS. Yes, thank you very much, Senator Metzenbaum. It is always a pleasure to appear before you. Seated to my left is Lloyd Constantine, the Chief of the Antitrust Bureau in New York State.

The National Association of Attorneys General, which I represent as Vice President and Antitrust Chairman, has already spoken forcefully and unanimously on this important issue.

Title 6 of our comprehensive legislative proposal, The State Attorneys General Antitrust Improvement Act of 1987, is similar in purpose and effect to S. 430. The thrust of S. 430 is to restore a logical standard of proof in RPM cases. The current illogical standard flows from the Supreme Court's decision in *Monsanto*.

While the Court upheld the longstanding principle that resale price maintenance is per se illegal, it erected a standard of proof for RPM cases which is contrary to basic principles of contract law, other judicial interpretations of the Sherman Act, Section 1, and the will of Congress.

The rules of evidence adopted in *Monsanto* are so far out of touch with the realities of today's marketplace that they are more likely to encourage vertical price-fixing than they are to deter this economically harmful and clearly illegal practice.

What is the evidentiary rule of *Monsanto*, and how has it served to undermine the prosecution of RPM cases? Perhaps a brief hypothetical case will clarify the points at issue. Suppose a manufacturer announces that all of its dealers must charge a set minimum retail price for its product in order to continue as dealers.

Some dealers charge the fixed minimum price, but others charge less. Some of the full-price dealers then complain to the manufacturer about the discount dealers, and the manufacturer responds by terminating the dealerships of the discounters who have not been going along with the fixed minimum retail price.

On the face of it, this scenario is a clear case of concerted activity to fix retail prices which violates Section 1. Yet, under the rules of evidence adopted in *Monsanto*, these facts would not be sufficient even to get an RPM case to a jury for their determination.

The Court requires additional evidence which tends to exclude the possibility that the manufacturer is acting unilaterally. Even though the full-price dealers have adhered to the manufacturer's fixed minimum retail price and the full-price dealers have communicated with the manufacturer to help enforce the set price, under the rule of *Monsanto* neither of these types of collaboration is held to constitute concerted activity.

Thus, the bizarre logic of *Monsanto* argues that a system of retail price-fixing that can only be maintained through agreement and active collaboration among the dealers and the manufacturer is really unilateral activity on the part of the manufacturer.

There are three major areas in which the *Monsanto* rule defies logic and precedent. First, the full-price dealer's acquiesence in charging a fixed minimum price in my hypothetical is a classic case of an adhesion contract under the traditional principles of contract law.

The manufacturer's offer and the full-price dealer's acceptance is a contract and is evidence of concerted activity in the same manner that a tying arrangement has been construed to involve concerted activity.

Second, the Court's refusal in *Monsanto* to recognize the communication between full-price dealers and the manufacturer in enforcing the fixed minimum price as concerted activity is both illogical and inconsistent with its rulings in analogous cases.

In *Monsanto*, the Court reasons that this communication between dealers and the manufacturer may merely inform the manufacturer in its efforts to enforce set retail prices unilaterally. If accepted, this reasoning creates a shield behind which most illegal RPM schemes can proceed without fear of prosecution.

Yet, in other RPM cases such as the *1980 Midcal* case and this year's *324 Liquor* case, the tortured logical of *Monsanto* was not applied. In both cases, the Court ruled State laws requiring wholesalers to unilaterally establish minimum retail prices as examples of per se illegal RPM schemes which violate Section 1.

The unreasonable and, in the real world, practically impossible standards of proof erected in *Monsanto* were not brought to bear in these two cases. The Court's inconsistency and confusion in this area calls for clarification along the lines that are set out in S. 430.

Finally, where is the Court's proper deference to the will of Congress in adopting the *Monsanto* rule? In the mid-1970s Congress abolished all State and Federal fair trade laws, which had allowed manufacturers to require retailer adherence to set retail prices, on the strength of the view put forth at the time by the Senate Judiciary Committee that these laws were nothing more or less than legalized price-fixing.

In repealing fair trade laws, Congress expected—indeed, required—that all manufacturer attempts to force retailers to charge fixed minimum prices would be viewed as unlawful. Yet, this very practice, a restraint of trade, consistently treated as unlawful since 1911 is condoned under the rules of evidence applied by the Court in *Monsanto.*

Senator METZENBAUM. Sum up, please.

Mr. ABRAMS. Let me close, therefore, accepting your admonition, Senator, and having the full thoughts and concepts that we have to offer submitted to the record.

Let me close by stating and assuring you that the State Attorneys General are strongly and unanimously committed to prosecuting illegal RPM schemes both because of our duty to uphold the law and our power under the Hart-Scott-Rodino Act to represent the consumers of our States in Federal antitrust damage litigation.

Again, we thank you very much for taking leadership in fashioning the bill, introducing it, and having it subjected to this kind of public airing today.

Senator METZENBAUM. I do not think you have said it, but I think you have implied that the National Association of Attorneys General does support S. 430?

Mr. ABRAMS. Unanimously. In fact, that concept is engrained in our legislative program that we have put forward this year.

Senator METZENBAUM. Good. Thank you, Mr. Abrams. Your testimony is always helpful.

[Prepared statement follows:]

STATEMENT OF

ROBERT ABRAMS

ATTORNEY GENERAL NEW YORK STATE

VICE-PRESIDENT AND ANTITRUST CHAIRMAN

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

"S. 430 AND ENFORCEMENT OF THE ANTITRUST LAWS

CONCERNING RESALE PRICE MAINTENANCE"

APRIL 23, 1987

Chairman Biden and members of the Committee. Thank you for this opportunity to address you concerning the issue of resale price maintenance ("R.P.M.") and S. 430, the so-called "Monsanto Bill."

The National Association of Attorneys General ("NAAG"), which I serve as Vice-President and Antitrust Chairman, has unanimously adopted a comprehensive set of antitrust legislative proposals entitled the "State Attorneys General Antitrust Improvements Act of 1987," which is annexed to my testimony and which I request be made part of the record of today's hearing. Title VI of NAAG's model act is similar in purpose and effect to S. 430.

The attorneys general unamimously support the objective of S. 430, which is to restore a logical standard of proof in R.P.M. cases. The current illogical standard results from the Supreme Court's decision in Monsanto v. Spray-Rite,[1] which while maintaining the per se rule in R.P.M. cases, erected a standard of proof which is contrary to basic principles of contract law and analogous interpretations of Sherman Act Section 1 and also contrary to the will of Congress. The evidentiary rules adopted in Monsanto are seriously out of touch with the reality of the marketplace and are likely to encourage rather than deter vertical price-fixing.

1. Monsanto Co. v. Spray-Rite Service Corp., 405 U.S. 752 (1984).

Allow me to illustrate the evidentiary rule of Monsanto. A manufacturer announces that its dealers must charge at least a specified minimum retail price in order to continue as dealers. Some of the dealers comply and others charge less. The manufacturer receives complaints about the discounting dealers from full-priced dealers. The manufacturer then terminates the dealerships of the discounters. Under Monsanto, the foregoing facts are not sufficient to submit to a jury the question of whether the dealer's termination was the result of illegal concerted activity. To get to the jury the Court requires additional evidence which tends to exclude the possibility that the manufacturer is acting unilaterally. Under the rule of Monsanto neither the full priced dealers adherence to the manufacturer's specified price nor the communications between the manufacturer and the full price dealers constitute either concerted activity nor evidence which tends to exclude the possibility of unilateral activity. This is clearly one case in which the Supreme Court's distance from the marketplace has seriously distorted its view of commercial reality.

A series of questions are suggested by the Court's tortured analysis. Why doesn't the full-priced dealers' acquiescence in charging the price fixed by the manufacturer constitute an adhesion contract under traditional principles of contract law?

If the manufacturer's offer and the full-priced dealers' acceptance does not constitute a contract, then where is the concerted activity which the Supreme Court has always recognized in a tying arrangement? In tying cases, the buyer accepts the tied product, indeed is coerced to accept it, in order to obtain the tying product. In my R.P.M. hypothetical, the dealer accepts the manufacturer's terms and charges the fixed price in order to maintain its dealership.

Why doesn't the communication between full-priced dealers and the manufacturer constitute concerted activity? The Court reasons that this communication may merely inform the manufacturer in its efforts to enforce set retail prices "unilaterally." The reasoning is circular and renders a bizarre picture of unilateral action orchestrated by the coordinated action of manufacturer and dealers. The Court erects this illogical construct to ensure the inviolability of a safe haven for unilateral acts which restrain trade. In Monsanto, the Court reasons that such unilateral acts are outside the ambit of Section 1 of the Sherman Act, which condemns "concerted" activity. Where then was the concerted activity in the 1980 Midcal[2] case. In Midcal a California statute required vintners to either enter into fair trade agreements or unilaterally promulgate retail price schedules which were binding on retail wine dealers. The Court condemned the unilateral promulgation

2. California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc. 445 U.S. 97 (1980).

of these price schedules as per se unlawful R.P.M. Similarly, where was the concerted activity in the January, 1987 decision of the 324 Liquor case?[3] In 324 Liquor, which my office argued, New York law required liquor wholesalers to unilaterally specify minimum resale prices, which bound retail liquor stores. At the argument of 324 Liquor last November, Justice White implicitly admitted the lack of concerted activity in either Midcal or the case being argued. However, in both cases the Court condemned the pricing schemes as violative of Section 1.

A final question is suggested. Where is the Courts proper deference to the will of Congress which abolished all state and federal fair trade laws in the 1970's? These laws permitted manufacturers to require retailer adherence to set resale prices but were condemned by the report of the Senate Judiciary Committee accompanying the fair trade repeal as nothing more or less than "legalized price-fixing."[4] The practice was legal only because of the Miller-Tydings Act not because it was deemed unilateral. Congress expected, indeed required, that conduct which is condoned under the evidentiary rule of Monsanto would be treated by the Courts as vertical price-fixing, a restraint consistently treated as per se unlawful since the 1911 decision in the Dr. Miles case.[5]

3. 324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987)

4. S. Rep. No. 466, 94th Cong., 1st Sess. 1, reprinted in 1975 U.S. Code Cong. & Admin. News 1569.

5. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

S. 430 or similar legislation would restore vitality to the per se condemnation of R.P.M. which has been partially vitiated by the Monsanto evidentiary rule. Congress condemned R.P.M. as a major extortion of consumers when it repealed the enabling legislation for state fair trade laws in 1975. The repeal of Miller-Tydings was vigorously supported by President Ford and Ronald Reagan and backed by studies of the Justice Department, the Federal Trade Commission, the Small Business Administration, the Library of Congress and the University of California variously placing the cost to consumers of fair trade R.P.M. at between $2.1 billion and $6.5 billion annually in 1975 dollars. Congress also noted that the rate of business failure was 55% higher in states which permitted fair trade.[6]

Until 1981 the law against R.P.M. was vigorously policed by private parties, state attorneys general, the F.T.C. and the federal antitrust division, which as late as the fall of 1980 indicted the Cuisinarts Company for engaging in an R.P.M. conspiracy with its dealers.

As you are aware Mr. Chairman, the current federal administration has not only refused to enforce the law against R.P.M., having failed to institute a single suit, but has expended considerable resources unsuccessfully trying to convince the Courts to abandon the per se rule in R.P.M. cases brought by

6. See, S. Rep. No. 466, 94th Cong., 1st Sess. 1, reprinted in 1975 U.S. Code Cong. & Admin. News 1569; Cong. Rec. Dec. 2, 1975 (statement of Sen. Brooke) at 38049.

private parties and state attorneys general. The Justice Department's so-called "amicus intervention program" where it argued in support of price-fixers, culminated in its brief to the Supreme Court in Monsanto, which was opposed in the amicus brief of 46 state attorneys general. Shortly thereafter the Congress prohibited the Antitrust Division from expending any resources in seeking to overturn the per se rule. This funding restriction, which is still in effect, was openly flouted when the Division adopted its Vertical Restraints Guidelines in January 1985. The Antitrust Division's Guidelines purportedly specify standards for enforcing the antitrust laws as they relate to non-price vertical restraints, which is yet another area where there has not been a single federal enforcement action in 75 months. The real agenda of these Guidelines was to continue the assault on the per se rule against R.P.M. Congress recognized this fact when in December, 1985 it enacted a law which included the pronouncement that D.O.J.'s vertical guidelines "do not accurately state current antitrust law, and shall not be considered by the Courts of the United States as binding or persuasive..."[7] Simultaneously, House Judiciary Chairman Rodino and other members of both Houses of Congress praised NAAG for its unanimous adoption of its own Vertical Restraints Guidelines on

7. H.R. Rep. No. 399, 99th Cong., 1st Sess. reprinted in Antitrust & Trade Reg. Rep. (BNA) No. 1242 Nov. 28, 1985 at 952; Antitrust & Trade Reg. Rep. (BNA) No. 1244 Dec. 12, 1985 at 1019.

December 4, 1985. The NAAG Guidelines strictly adhere to settled law on the per se rule for R.P.M. and specify the factors which attorneys general consider in conducting a "rule of reason" analysis of non-price vertical restraints of trade.

The attorneys general have taken this strong and unanimous stand on R.P.M. for several reasons. First and foremost because we are law enforcement officials, sworn to uphold the law. I, personally, am offended by the openly contumacious attitude the federal enforcement agencies have shown to the rule of law in this area. Second, the attorneys general are empowered by the Hart-Scott-Rodino Act to represent the consumers of their states as parens patriae in federal antitrust damage litigation. Retail price-fixing is at once the trade restraint which most directly touches our consumers and the only restraint for which consumers always may recover damages. (In horizontal price-fixing cases the indirect purchaser rule of the Illinois Brick case often precludes an award of damages to ultimate consumers).

The state attorneys general take these committments to the rule of law and to our consumers seriously and have instituted numerous retail price-fixing cases. In my own state, we recovered nearly $8 million in damages and convicted 47 companies and individuals for their participation in a series of R.P.M. conspiracies in the milk industry. Last year my office and the Maryland Attorney General jointly investigated an alleged R.P.M. conspiracy involving the Minolta Company. We then arranged for

the coordinated filing and settlement of lawsuits by 37 state attorneys general. The Minolta case was the first national R.P.M. litigation instituted by a government enforcement agency since the Cuisinart case in 1980. Unfortunately, however, the illogical and confusing evidentiary rules announced in Monsanto erect a serious obstacle to prosecuting many other R.P.M. conspiracies.

In conclusion Mr. Chairman, the Supreme Court has exhibited a high degree of confusion in the Monsanto evidentiary ruling and the cases interpreting related issues of law. The Court has vacillated from case to case on the issue of when a firm at one level of the market may unilaterally require firms at another level to charge a set, minimum or maximum price. It has alternated its views of what constitutes "concerted" or "unilateral" activity from case to case and the significance of this factor in interpreting Section 1 of the Sherman Act. S. 430 is a modest and appropriate legislative response to this confusion. Furthermore, it is a response which is necessary to assure vigorous enforcement of the law against R.P.M., which the Congress, responsible government enforcement officials and the Court itself all consider a pernicious and per se unlawful form of price-fixing.

NAAG'S PROPOSED MODEL LEGISLATION FOR ANTITRUST REFORM

A BILL

To improve the enforcement of the Antitrust laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "the State Attorneys General Antitrust Improvements Act of 1987."

TITLE I. DEFENDANTS' ATTORNEYS' FEES

Section 101. Section 4 of the Clayton Act (15 U.S.C. 15) is amended by adding after subsection (c) the following new subsection:

"(d) In any action under this section the court shall award the cost of suit, including a reasonable attorney's fee, to a substantially prevailing defendant upon a finding that the plaintiff's conduct was frivolous or in bad faith. However, a defendant may not recover costs or attorney's fees from the United States nor from an Attorney General of a State."

Section 102. Section 16 of the Clayton Act (15 U.S.C. 26) is amended by adding at the end thereof the following:

"In any action under this section in which the defendant substantially prevails, the court shall award to such defendant the cost of a suit, including a reasonable attorney's fee, upon a finding that the plaintiff's conduct was frivolous or in bad faith. A defendant may not recover costs or attorney's fees from the United States nor from an Attorney General of a State."

TITLE II. RECOVERY OF DAMAGES SUSTAINED BY THE UNITED STATES

Section 201. Section 4 of the Clayton Act (15 U.S.C. 15) is amended to read as follows (amended material is underlined):

§ 15 Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person, *including the United States,* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only —

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

Section 202. Section 4A of the Clayton Act (15 U.S.C. 15a) is repealed.

TITLE III. INTERLOCKING DIRECTORATES

Section 301. The fourth paragraph of section 8 of the Clayton Act (15 U.S.C. 19) is amended by —

(a) striking out "any one" and inserting in lieu thereof "each";

(b) striking out "$1,000,000" and inserting in lieu thereof $10,000,000"; and

(c) adding at the end the following:

"For each fiscal year commencing after September 30, 1986, the $10,000,000 threshold in this paragraph shall be increased as of October 1 each year by an amount equal to the percentage increase in the Gross National Product, as published by the Department of Commerce or its successor, for the year then ended over the level so established for the year ending September 30, 1985.".

TITLE IV. FORUM NON CONVENIENS

Section 401. Section 7 of the Sherman Act (15 U.S.C. 6a) is amended by —

(1) inserting "(a)" before "This Act"; and

(2) adding at the end thereof the following new subsection:

"(b) Whenever a motion to dismiss for lack of subject matter jurisdiction under this section shall be made, the court shall, except for good cause shown, hear and determine such motion, after such discovery or other proceedings directly related to the motion as the court deems appropriate, before conducting or permitting the parties to conduct any further proceedings in this action.".

TITLE V. INDIRECT PURCHASERS

Section 501. The Clayton Act is amended as follows:

"4(I)(1) In any civil action brought by a State Attorney General or the United States alleging a contract, combination, or conspiracy among competitors to fix, maintain, or stabilize prices, or to allocate markets, customers, or territories, a claim for damages may be based on indirect purchases. In the case of a civil action on behalf of producers of agricultural products, a claim for damages may be based on indirect sales in addition to any other claim permitted."

"4 (I) (2) (A) In any suit for the recovery of damages as provided for in Section 4 (I) (1) herein, it shall be presumed, in the absence of clear and convincing proof to the contrary, that the end user suffered the full amount of the antitrust injury. For the purpose of applying this presumption, the term "end user" means the last indirect purchaser who purchased the item in substantially the same form as it existed at the time of alleged antitrust violation.

"4 (I) (2) (B) If a State attorney general or the United States asserts a claim for damages based on indirect purchases or sales pursuant to subsection (I) (1), the defendant shall be entitled to allege, as a partial or

complete defense to a claim by a direct purchaser or seller based on the same or substantially the same alleged conduct, that some or all of what would otherwise constitute the direct purchaser's or seller's damages were passed on by the direct purchaser or seller to persons on whose behalf the claim for damages from indirect purchases or sales was brought.

"4(I) (2)(C) In the case of a claim based on indirect purchases or sales, the award shall be treble the amount of the overcharge or underpayment shown by the indirect purchaser or seller to be properly allocable to it (in addition to costs and attorneys' fees).

"4(I)(2)(D) The amount awarded to a plaintiff for a claim based on direct or indirect purchases or sales shall not duplicate amounts previously awarded to a direct or indirect purchaser or seller for the same overcharge or underpayment based on proof in fact of such injury.

"4 (I) (3) (A) Any person entitled to maintain an action pursuant to subsection 4 (I) (1), alleging injury from indirect purchases or sales, may intervene in any action under section 4 alleging injury from direct purchases or sales based on the same or substantially the same alleged conduct, if a request for such intervention is made within six months after the date of the filing of the initial action. The failure to request intervention in a pending action by any person alleging injury from indirect purchases or sales, within such time, shall constitute a bar to a claim by such person for injury from indirect purchases of sales based on the same or substantially the same alleged conduct.

"4(I)(3)(B) Any person initiating an action under section 4 may intervene in any action under subsection 4 (I) (1) which alleges injury from indirect purchases or sales based on the same or substantially the same alleged conduct.

"4(I)(3)(C) Upon a request made by the defendant, the court shall order the consolidation of any pending actions pursuant to subsection 4 (I) (1) alleging injury from indirect purchases or sales and any other action under section 4 based on the same or substantially the same alleged contract, combination, or conspiracy.

"4 (I) (4) Upon the initiation of any action pursuant to subsection 4 (I) (1) alleging injury from indirect purchases or sales, the State attorney general shall provide reasonable public notice of the allegations of the suit and, to the extent possible, a general description of any direct purchasers who may, be entitled to maintain an action under section 4.

"4 (I) (5) Upon the initiation of any action pursuant to section 4 alleging a contract, combination, or conspiracy among competitors to fix, maintain, or stabilize prices, or to allocate markets, customers, or territories, the plaintiff shall provide reasonable notice of the allegations of the suit to the State attorneys general."

TITLE VI. PROOF OF CONSPIRACY

Section 601. Evidentiary Standards in Federal Civil Antitrust Actions Relating to Price Fixing.

(a) In an action commenced under the Clayton Act (15 U.S.C. 12 et seq.) with respect to a claim arising under section 1 or 3 of the Sherman Act (15 U.S.C. 1, 3) and alleging a contract, combination, or conspiracy to change or maintain a price level, including a minimum or maximum price, evidence that a person who sells a good or service to the claimant for resale -

(1) received from a competitor of the claimant a communication regarding price competition by the claimant in the resale of such good or service, and

(2) in response to such communication terminated the claimant as a buyer of such good or service for resale, or refused to supply to the claimant some or all of such goods or services requested by the claimant,

shall be sufficient to raise the inference that such person and such competitor engaged in concerted action to change or maintain a price level, including a minimum or maximum price, for such good or service in violation of such section.

TITLE VII. CONSENT AGREEMENTS

Section 701. The Clayton Act is amended by adding between Section 7A and Section 8 the following:

"CONSENT AGREEMENTS AND DECREES AND ORDERS IN ACQUISITIONS

Sec. 7B (a) With respect to any acquisition -

"(1) no Commission consent agreement,

"(2) no consent decree proposed to a court of competent jurisdiction by the Commission or the Attorney General, and

"(3) no order issued by either the Commission or, in the case of an action brought by the Attorney General, a court,

which provides for the divestiture of any part of the assets of a party to such acquisition shall become final before the required divestiture has been approved by the Commission or the court. If the divestiture required by a consent agreement, consent decree, or order is not approved, such agreement, decree, or order may be rescinded by the Commission or court and the Commission or the Attorney General may petition the court for further relief or, if appropriate, initiate an action or proceeding to consider the legality of the acquisition and the need for further relief.

"(b) The provisions of consent decrees proposed by the Attorney General or the Commission shall be enforceable consistent with the terms of the agreement, in accordance with procedures authorized by law for enforcement of final orders and decrees.

"(c) No divestiture shall be deemed an acceptable remedy for an acquisition that substantially lessens competition unless the divestiture fully restores competition lost as a result of the acquisition and there is a substantial likelihood that any buyer of divested assets will be viable competitor for the forseeable future. In approving divestitures, the Attorney General, the Federal Trade Commission, or the court, as appropriate, shall insure that reasonable steps are taken to protect the interests of affected employees and to preserve employment consistent with the full restoration of competition."

Section 702. Section (5) (e) of the Clayton Act (15 U.S.C. 16)) (e)) is amended by:

(1) Striking out the period at the end of paragraph (2) and inserting in lieu thereof ";and" ;and

(2) Adding at the end thereof the following:

"(3) the probable commercial viability of any enterprise or facility to be divested where a proposed consent judgment provides for divestiture of any enterprise or facility."

Section 703. Section 5 (b) of the Clayton Act (15 U.S.C. 16 (b)) is amended as follows:

"Any proposal for a consent judgment *settlement, voluntary, dismissal, or stipulated modifications of judgments entered to terminate civil actions* submit-

the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws...."

Section 704. Section 5 (f) of the Clayton Act (15 U.S.C. 16 (f)) is amended by adding at the end thereof the following: "Where any settlement, consent judgment, voluntary dismissal or stipulated modifications of judgments entered to terminate civil actions, proposed by the Justice Department or the Federal Trade Commission provides for divestiture of one or more enterprises or facilities which collectively employ more than 100 full-time employees in a State, the attorney general of such State shall be deemed to be an interested party and may intervene as of right in any proceeding under subsection (e)."

TITLE VIII. ACCESS TO PRE-MERGER MATERIALS

Section 801. Section 7A (h) of the Clayton Act (15 U.S.C. 18a (h)) is amended by adding at the end of such section the following:

"Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress, *or to state Attorneys General for the purpose of investigating or enforcing a claim under the federal or state antitrust laws, upon the prior certification of such Attorney General that such information will be maintained in confidence and used only for such purposes.*"

TITLE IX. REPEAL OF THE McCARRAN-FERGUSON ANTITRUST EXEMPTION

Section 901. The first section of the McCarran-Ferguson Act, 15 U.S.C. 1011, is amended to read as follows:

"Congress hereby declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States; but that a continued broad immunity from the antitrust laws enjoyed by the business of insurance is unwarranted;"

Section 902. Section 1012(b) of such Act is amended by striking out "to the extent that such business is not regulated by State law" and inserting in lieu thereof a period.

Section 903. Such Act is amended by striking out section 3, 15 U.S.C. 1013, and redesignating sections 4, 5 and 6 as sections 3, 4 and 5 respectively.

Section 904. Section 4 of such Act, as redesignated, is amended by striking out "Alaska, Hawaii,".

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Senator METZENBAUM. Mr. Mark Silbergeld.

Mr. SILBERGELD. Thank you, Mr. Chairman. We join in commending you and your cosponsors for the introduction of this legislation and we fully support it.

Senator METZENBAUM. Thank you.

Mr. SILBERGELD. Resale price maintenance should be declared unlawful *per se* in the language of the law. This has been a longtime judicial rule since the famous *Dr. Miles* case in 1911, and it has been repeatedly supported by Congress from time to time, though not unanimously by federal enforcement officials.

Consumers Union has long opposed resale price maintenance practices beginning with the Miller-Tydings Act, introduced in 1935, continuing with opposition to the McGuire Act in 1952 when it was adopted, and supporting the enactment of the Consumer Products Pricing Act in 1975.

Why? It stands to reason that when manufacturer and retailer are agreeing not to sell the consumer a product below a certain price, they are not conspiring in the consumer's best interest. The assertions to the contrary by certain devotees of the University of Chicago School of Economics are clearly counter-intuitive and, I would add, not supported by empirical evidence.

Senator METZENBAUM. Did you say they are not conspiring?

Mr. SILBERGELD. No. I say when they are conspiring, they are not conspiring in the consumer's best interest.

Senator METZENBAUM. Okay.

Mr. SILBERGELD. The arguments for permitting resale price maintenance place far too much emphasis and reliance on the effectiveness of interbrand competition. That clearly is not the situation in many product markets.

The goodwill argument that used to be made in support of resale price maintenance, I believe, is certainly passe more than a decade after the 1976 effective date of the Consumer Products Pricing Act, and 10 years of effective discounting of prestige consumer goods.

The free rider argument is fallacious in a number of respects. Price does not guarantee service by the full-price seller. Consumers may not want to pay for the service in any event. It would lock in inefficiencies and it certainly has not wiped out high-end dealers in those product lines for which there is some evidence that at least some consumers want the services and retailing expertise that go along with complicated products.

The administration, on the other hand, has become the Cheshire cat of vertical price-fixing enforcement; there is nothing left but their grin. They have, in fact, gone in before the Supreme Court to propose repeal of the judicial *per se* rule.

The Justice Department in the *Monsanto* decision took that position, and its vertical guidelines reflect an unwillingness to bring these cases. In fact, no case has been brought under this administration.

But as you will note in Footnote 7 of my prepared testimony, we are also talking about the Federal Trade Commission. FTC Chairman Oliver has both professed that he cannot criticize the per se rule and then backhandedly done so in the same sentence. You should read this in the context of his direct attacks on the anti-

trust laws in general and on the Sherman Act, in particular. You will find those citations in my testimony.

I commend also to you a copy of, and I will provide for the staff, Chairman Pertschuk's 1983 testimony, in which he outlines the way in which the Bureau of Competition at that time regularly undermined the enforcement of vertical price restraints at the Federal Trade Commission.

I have no evidence that the basic attitude has changed over there, even though I believe we now have three or four commissioners who would vote to issue complaints in such cases if the staff were to forward them.

But the cases are not forthcoming, Mr. Chairman, and I conclude that, therefore, the *per se* rule needs to be in the language of the law. I have submitted to the staff a compilation of an extensive collection of Consumer Reports articles opposing resale price maintenance. These are for inclusion in the record or such other use as the subcommittee may determine appropriate.

Let me just say in closing that while I am not an expert on the antitrust case law and do not follow the cases, especially the private cases, individually as they develop, we support, in principle, the bill's proposed change in the evidentiary standard, as well as the inclusion of the per se language in the statutes that are relevant.

Thank you very much, Mr. Chairman.

[Prepared statement follows:]

78-774 O - 88 - 2

Testimony of

MARK SILBERGELD

DIRECTOR, WASHINGTON OFFICE

CONSUMERS UNION OF U.S., INC.

on

S. 430

RETAIL COMPETITION ENFORCEMENT ACT

of 1987

before the

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

APRIL 23, 1987

Mr. Chairman and Members of the Committee, Consumers Union[1] deeply appreciates your invitation to be heard on S.430, which would help greatly to preserve competition in the retail pricing of consumer goods. This proposed legislation is meritorious and important to consumers. We hope the Committee will act expeditiously and favorably on it.

In the second year of publication of Consumer Reports, Consumers Union informed its readers that the recently enacted Miller-Tydings "Fair Trade" Act was an inappropriate "piece of legislation which has the effect of raising the cost of living."[2] Our October, 1937, issue outlined in detail how resale price maintenance schemes worked this deleterious effect on consumers' pocketbooks --raising the prices of baby food, pharmaceuticals, liquor, auto accessories and life's other necessities and conveniences[3]

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[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with approximately 3.5 million circulation, regularly carries articles on health, product safety, marketplace economics and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] "A Job For Congress", Consumer Reports, Vol. 2, No. 9, Nov. 1937, p.2.

[3] "What Price Fixing Means", Consumer Reports, vol 2, No. 8, Oct. 1937, p.3.

THE HARMFULNESS OF VERTICAL PRICE FIXING

Since 1937, we have regularly informed consumers of the harm to the family budget which results from vertical price fixing (resale price maintenance) and the benefits to consumer from a marketplace in which each independent seller in the manufacturing and distribution chain independently sets its own price for a consumer product. We have supported various efforts to repeal the Miller-Tydings Act (and, after its 1952 enactment, the McGuire Amendment), beginning with the King bill in 1939 and culminating with the Consumer Goods Pricing Act in 1975. With the permission of the Committee, I would like to submit for the hearing record, or such other appropriate use as the Committee may determine, a compilation of Consumer Reports articles on this subject.

Why is resale price maintenance bad for consumers, and why should it be unlawful, per se? Put most simply, competition, and the innovation and lower prices that result from it, is the most appropriate means of determining a fair price in the marketplace. Whenever two independent sellers in the marketplace agree on a minimum selling price for a product, they are reasonably certain to have their own interests, rather than consumers' interests, as their primary concern. Unfortunately, general expressions of belief in the principles of competition and "free enterprise" are not always accompanied by support for their particular applications.

There have been offered, over the years, various arguments as to why an exception to the principle of competition

should be made for resale price maintenance, either by sanctioning it, as did the Miller-Tydings Act, or by subjecting its legality to a rule of reason test, as the Justice Department and the Federal Trade Commission have done in recent years, de facto and contrary to the intent of the Supreme Court and the Congress.

Among these arguments, perhaps the primary one has been that resale price maintenance only affects intrabrand competition, but interbrand competition, the primary competitive force in the economy, may actually be enhanced by it. Thus, the argument goes, consumers can rely on the horizontal competition among manufacturers to assure that there is sufficient price competition in the sale of goods and services. There are two problems with this argument.

First, in many consumer product lines there is not perfect competition and there may be substantially imperfect competition. Intrabrand competition becomes especially important where this is the case. While price competition at retail is a highly imperfect substitute for perfect horizontal competition at the manufacturing level, it helps to keep prices competitive.

Second, the argument is counter-intuitive. The very purpose of such agreements almost always is to keep prices up, not down[4]-- and there is no empirical evidence to overcome the

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[4] But see Albrecht v. Herald Co., 390 U.S. 145 (1968), an example of vertical enforcement of maximum resale price restrictions. Contrary to the legal holding in that case, manufacturer-enforced maximum price restrictions in monopolized markets, including natural manufacturer monopolies and retail monopolies, are an appropriate exception to the general principle based on the economic analysis of pricing probabilities, and a rule of reason test should be applied.

argument's patent lack of logic.

A second argument is the "goodwill" argument. This suggests that manufacturers who spend substantial sums to establish public goodwill for their products have the value of that goodwill --as well as the viability of their small retailer distribution system-- undercut by the use of their products as loss leaders by discounters, or by discounter's relative lack of product knowledge and product-related service. This argument is very old and perhaps no longer relevant. It is premised largely on the assumption that consumers use price as a surrogate measurement for quality. After a decade in which quality goods have been discounted, we believe that this argument no longer retains whatever force it may once have had. Consumers now make their decisions about the quality of many goods based on non-price information, and many consumers regularly engage in looking for high-quality goods at bargain prices. Given the large volume of sales of quality products at discount, it seems clear that discounting does not erode goodwill.

A third argument, closely related to the goodwill argument, is the "free rider" argument. It suggests that so-called "full service" retailers, who spend substantial sums to provide a variety of services related to the consumer purchasing decision and post-purchase maintenance[5], cannot remain in business if free-riding discounters who do not expend such funds or provide such services can make sales to consumers

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[5] These including advertising and promotion, knowledgable demonstrations and explanations of the product and its features, product preparation, installation and service.

who have already received free pre-purchase services such as demonstrations from the full-service dealer. Whether as a result of discounting there are fewer full-service dealers, or whether such dealers since the advent of discounting have experienced depressed profit levels, depends on the product line. There are, after all, some products that benefit from such services and some products that, with the exception of retail advertising, do not.

However, it is clear with respect to many products that such dealer services continue to attract buyers, not merely shoppers. The reasons may be conjectural, but some consumers clearly value these services --especially the post-purchase services that may be (but are not necessarily) unavailable from or through a discounter-- enough to keep many of them in business. We have reached the a point when we must disbelieve the full service dealer who has continued to claim for many years that discounting will drive him out of business.

We do not believe that these or other arguments for resale price maintenance carry the burden of persuasion. In any event, as Adam Smith has written, the economy exists to serve the consumer. If consumers prefer lower prices to greater service, they should have the right to make that decision.

THE PER SE RULE AND ITS ADMINISTRATIVE ABROGATION

In 1975, with the full support of the President, the Justice Department and the Federal Trade Commission, Congress repealed the Miller-Tydings Act by enacting the Consumer Goods Pricing Act. In doing so, it re-sanctioned the decades-old

judicial doctrine that resale price maintenance --vertical price fixing-- is illegal per se. But the current administration has become the Cheshire Cat of vertical price-fixing enforcement --all that's left is its grin. It has has abrogated de facto the per se nature of the rule. The Justice Department, in its role as amicus curiae in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), has advocated adoption of a rule of reason test in place of the per se rule. And the Department's explicit policy is to prosecute vertical price-fixing only on a rule of reason basis under certain circumstances which --given the announcement of the policy-- it is easy for would be vertical price-fixers to meet.[6]

The recent chairmen of the Federal Trade Commission have, likewise, held to the economic ideology that vertical price restraints are seldom anti-competitive.[7] Congressional

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[6] "Vertical Price Guidelines," U.S. Department of Justice, January, 1985.

[7] See "Report From Official Washington," remarks of Daniel Oliver, Chairman, U.S. Federal Trade Commission, before the Section on Antitrust Law, American Bar Association, April 3, 1987. ("...vertical arrangements generally enhance consumer welfare by intensifying inter-brand competition. Of course, some vertical price arrangements remain per se illegal. And as you know, I cannot say anything to denigrate the per se rule against resale price maintenance. I am reminded, however, of something Alice Roosevelt Longworth was reputed to say to her guests at dinner parties: 'If you have nothing good to say about someone, come sit next to me.'") (Former Chairman James C. Miller held similar views.)

Chairman Oliver's statement should be read in the context of his remarks against the antitrust laws in general and the Sherman Act in particular: "Antitrust Reform: Staying Alive?," remarks before the 20th New England Antritrust Conference, Cambridge, MA, November 15, 1986. It is noteworthy that these remarks were made to practitioners of the antitrust bar, clearly signalling the attitude of the Agency's head to those who counsel business firms.

declarations to the contrary not withstanding, there have been no prosecutions against vertical price-fixing. For these reasons, it is important for the Congress to establish, in statutory language, that vertical price-fixing is unlawful per se.

EVIDENTIARY STANDARDS OF VERTICAL PRICE-FIXING

Thus, the antitrust enforcers have abandoned vertical price-fixing enforcement. To make matters worse, the Supreme Court, in the Monsanto case, has conditionally excluding inferences, drawn from certain indirect evidence, that the manufacturer and a discounter's competitor(s) have acted in concert, rather than independently, to terminate the discounter's dealership in the manufacturer's product. Such inferences are only permitted if plaintiff can submit evidence to overcome the possibility that the manufacturer and plaintiff's competitors acted independently.

Since antitrust conspirators are not likely to leave direct evidence of their concerted action where victims of that action or the government can find it, inferences from indirect evidence may be the only way to prove such a conspiracy. And the evidence needed to overcome a presumption of independent action is likely to be in the control of defendants, not of plaintiff.

This is coupled with the de facto use of a rule of reason test by federal prosecutorial agencies in circumstances easily created by those who would like to engage in resale price maintenance. Thus, it is possible that the only time the public

will be protected, through legal actions of either the government or plaintiffs, from practices that the Congress in 1975 thought it was making unlawful per se will be when conspirators are foolish enough to put their conspiracies in writing -- or to inadvisedly tape their own price-fixing conversations.

CONCLUSION

For these reasons, we commend Senators Metzenbaum, Bradley, Rudman and Simon for sponsoring S.430 and we urge the Committe to act expeditiously and favorably on it.

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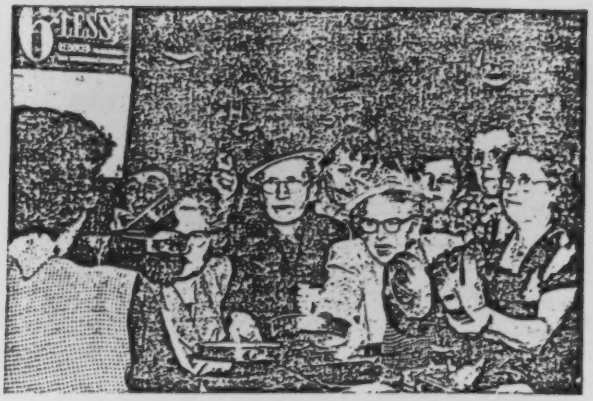

FAIR TRADE

- *the issues*
- *the arguments for*
- *the arguments against*
- *CU's stand*

When, last year, the Supreme Court dealt a death blow to the "nonsigner" clauses in the "Fair Trade" acts, CU predicted vigorous lobbying activity on the part of drug, jewelry, hardware and other dealers in price-fixed merchandise, to obtain legislation to compel recalcitrant price-cutting retailers to sell fair-traded items at the uniform level set by the manufacturer. We were not wrong. A staff member of a congressional committee has reported that not since the fight against the OPA has such an organized business campaign of letter-writing, telegrams, and personal pressure been witnessed in Washington.

Its aim is, of course, to pass a law to compel all dealers in the 45 "Fair Trade" states to sell a vacuum cleaner listed at $59.95 at that price, and not at, say, $39.95; to sell price-fixed razor blades at 49¢ and not at 39¢; a price-fixed watch at $100 and not at $75. In many fields, swollen inventories have in recent months, in the absence of binding price-maintenance laws, caused many chains, department stores and aggressive retailers to break away from the uniform-price patterns which had grown up in the shelter of the Miller-Tydings Act and the fair-trade laws.

There is no federal resale price maintenance law, nor has there ever been one. Legislation for such a national law has been introduced into Congress year after year from as early as 1914 but it has always failed to pass. But when prospects for national legislation grew dim, fair-trade promoters took to the state legislatures where lobbyists are, by and large, more successful and where laws can sometimes be slipped

Continued on next page

through without too much public awareness.

In 1931 the first state resale price maintenance law was passed in California. In all important respects this state law was the same as the federal ones which had been consistently turned down by Congress; that is, it permitted manufacturers to enter into price-fixing agreements with individual retailers. In 1933, California's original law was amended to provide that when one retailer signed a contract, all other retailers of the same product in California were bound by that single contract even though they had not entered into the agreement. This is the now famous nonsigner clause.

Now that they had a law with teeth in it, fair-trade enthusiasts moved rapidly in state after state. As H. G. Morison, Assistant U. S. Attorney General, pointed out, the proponents were ". . . in such a rush to get these laws passed that several States passed this law with an identical typographical error which had to be corrected in subsequent legislation."

In a few years all but three states (Vermont, Texas and Missouri) had been brought into line. Federal law, however, takes precedence over state law. Only one barrier then remained: the federal antitrust laws, which apply to all transactions in interstate commerce (trade that crosses state boundaries). Since the supporters of Fair Trade were primarily manufacturers who advertise and sell nationally, they were aware that state price-fixing contracts might well be considered violations of federal law.

The Miller-Tydings Act

The Miller-Tydings Act—attached as a rider to an appropriations bill to evade what would otherwise have been certain presidential veto—vaulted this last barrier. The Act was not a federal fair-trade law. It simply exempted manufacturers who sign price-fixing contracts with retailers from federal antitrust prosecution, provided such contracts were permitted by state law.

Last May, the Supreme Court in its ruling on the now-famous Schwegmann Case decided that the Miller-Tydings Act did not give manufacturers the right to enforce retail price maintenance on noncontracting retailers. In short, the Court knocked out the nonsigner clause, and left Fair Trade toothless.

In February, two House Subcommittees heard evidence on a number of bills designed to put teeth back into the 45 state Fair Trade laws, and one bill aimed at extracting the remaining teeth.

THE MORANO BILL (H.R. 4662) would bind nonsigners with regard to resale price maintenance contracts in *intrastate* sales, but not necessarily when sales are made over state lines.

THE MCGUIRE BILL (H.R. 5767) would institute criminal penalties for nonsigners who violate the price agreements, and some of its proponents claim that the McGuire Bill would make such agreements binding in *interestate* commerce as well.

THE KEOGH BILL (H.R. 6367) would bind nonsigners in intrastate sales (where state price maintenance laws exist) and prohibits delivery of fair-traded goods below the fixed price into fair-trade states.

THE CURTIS BILL (H.R. 4365) would repeal the Miller-Tydings Act and thus close this loophole in our federal antitrust laws.

the issues

In opening the hearings of the special subcommittee on the Study of Monopoly Power, Chairman Emanuel Celler termed the problem "one of the most perplexing legal and economic issues which has been before the Congress for more than two decades."

As Mr. Celler said, "Proponents of Fair Trade argue that if these court decisions remain in force, the manufacturer, the wholesaler, the retailer, and the consumer will suffer, competition will vanish, and monopoly will become the order of the day. On the other hand, the opponents of Fair Trade argue that either a continuation of the Miller-Tydings exemption to the Sherman Act, or nullification of the court decisions, will stifle competition, encourage the growth of monopoly, and reduce to a shell the American tradition of free enterprise and aggressive competition for the favor of the consumer."

The current lineup of major forces in the Washington battle runs something like this:

● FAVORING FAIR TRADE LAWS: American Fair Trade Council, manufacturers of price-fixed merchandise, associations of retail druggists, hardware dealers and jewelers, and independent businessmen.

● OPPOSING FAIR TRADE LAWS: U. S. Department of Justice, Federal Trade Commission, National Grange, American Farm Bureau Federation, CIO, consumer groups, leading department stores (such as Macy's) and independent retailers who desire to control their own prices. A number of business and trade organizations, including the National Association of Manufacturers, have declared their neutrality.

Since the testimony in the hearings so clearly illuminates the vital issues involved, we are excerpting here typical opinions on both sides of the question. We conclude with CU's recommendations as to a wise course of action.

the arguments for

First, let us consider the testimony for Fair Trade.

The International Silver Company asserted that it had invested 25 million dollars to create public acceptance of its brand names and that mass-type retailers were offering its products at a price 30% below the fair-trade figure as loss-leader bait to draw traffic into their stores. A few large companies were held to be preying upon the estab-

lished goodwill of thousands of small retailers and depriving manufacturers of trademark value.

John W. Anderson, president of the American Fair Trade Council, in a hundred pages of testimony and exhibits, deemed the enactment of fair-trade laws essential to stop predatory price manipulation made possible by modern distribution to the detriment of straightforward retailers and the consuming public.

Fair Trade, he insisted, improves quality and promotes competition and freedom of choice. Many well-known brands are vigorously promoted, and by means of Fair Trade a cut-price downward spiral is prevented as is also a "quality squeeze." Monopoly in distribution is retarded. Since no manufacturer is compelled to fair-trade his product and since no retailer is compelled to handle it, a nonsigning retailer by his own voluntary action in purchasing the product, in effect, assents to the minimum resale price restriction, and knowingly and willingly commits an act of unfair competition when he cuts prices.

Rivers Peterson of the National Retail Hardware Association gave specific illustrations of a Muncie, Ind., hardware store which had purchased five dozen *GE* irons for Christmas sale and due to "predatory price cutting" by a chain drugstore had disposed of practically none; of a Louisville, Ky., department store which used Pyrex ware as an effective bait; and of a Fort Dodge, Iowa, drug company which sold toasters and mixers on a 13% margin instead of the customary 33⅓%. From California he drew the illustration of a *Universal* coffee maker sold by a supermarket for $21.95 (fair-trade price, $29.95). He concluded: "The Congress of the United States has protected workers from exploitation by enacting a minimum wage law. It has protected farmers from exploitation by enacting parity legislation and by other means. We ask that you give the small retailer at least equal consideration and protect him from exploitation on the part of the predatory price-cutter by enacting fair-trade legislation."

The druggists' spokesman

Perhaps the most articulate witnesses for Fair Trade, however, were those representing drugs and cosmetics. Herman Levy, counsel for the Maryland Pharmaceutical Association and the Baltimore Retail Druggists Association, stressed the importance of Fair Trade in preventing monopoly in retail distribution. "Fair Trade," he said, ". . . has resulted in bringing the customer into the store of the small businessman where he can purchase the fair-traded merchandise at a reasonable price, usually not sufficient to give a substantial profit to the distributor, and the storekeeper is thereby enabled to sell the customer other merchandise, not fair-traded, at a larger margin of profit. . . . The small, independent, efficient distributor under Fair Trade will be able to survive and earn a fair livelihood without any prejudice whatsoever to the consumer."

The National Federation of Independent Business represented by George J. Burger reported the results of more than 100,000 ballots sent to independent businessmen asking whether Congress should immediately restore the fair-trade laws. Sixty-eight per cent replied in the affirmative. ". . . This prosperity is largely profitless and becoming worse day by day," he asserted.

The National Association of Tobacco Distributors added their feeling that, "without a federal enabling act which will make the individual state fair-trade laws operative, thousands of independent businessmen are faced with serious financial losses and eventual bankruptcy." Small independent retailers have been forced into competition with the "predatory syndicated chains and gigantic retail outlets."

The Bulova Watch Company noted "a rash of cut-price loss-leader" sales of their products in cut-rate stores and nonjewelry outlets threatening the "very existence of the small jeweler who needs such products to survive.

"Another byproduct," they noted, "has been considerable loss of excise tax income to the Government."

the arguments against

Vigorous opposition to fair-trade statutes was offered by H. G. Morison, Assistant Attorney General of the United States in charge of the Antitrust Division. He urged the enactment of the Curtis bill to repeal the Miller-Tydings Act. "Resale price maintenance laws were depression born," Mr. Morison affirmed. ". . . The Department of Justice opposed enactment of the Miller-Tydings Act and is convinced that it is not beneficial to any segment of our society. This law is contrary to the basic American principle which has kept our economy dynamic and vigorous—that the regulator of our free enterprise system shall be competition, not the suppression of competition either by government regulation or by private agreements."

Pointing to the tendency of trade associations to use the Miller-Tydings Act as a cloak for monopoly, Mr. Morison entered into the record indictments returned against the National Wholesale Druggists Association. The Wholesale Druggists, for example, had carried out boycotts of goods of manufacturers which were not fair-traded. "Being unorganized, consumers receive scant consideration under this scheme and it is nonsense to say that the consumer exercises control over resale price maintenance agreements; or that his interests are considered in their execution. The average family buyer simply finds himself confronted with high prices, set artificially, and in reality with no choice whether he shall buy or refrain from buying. . . . I think I have a right as a free American to make my own mistakes about what I buy. And I will learn my own lesson. I do not want any private group telling me what I may or may not do and what price I may pay for it."

The FTC's testimony

The Federal Trade Commission underlined the testimony of the Attorney General's office, holding fair-trade laws to be the arbitrary imposition of minimum prices at levels fixed without reference to cost differences among different distributors and dealers. The Commission's economist, John M. Blair, pointed to the fact that retail chain units, which have declined in numbers in the last 20 years, have barely held their own in percentage of retail sales. The Robinson-Patman Act had, he held, a salutary effect in

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continued

lessening price discrimination. Resale price maintenance laws, however, are price-fixing measures which confer on private individuals, powers over the business of others which are not even delegated to public bodies. Such laws are "anti-efficiency" measures. Quoting a study made for the Commission by Dun & Bradstreet, the FTC concluded that failure of retail drug stores in states without fair-trade laws in the years studied, 1939, 1940, 1946, and the first ten months of 1947, were no higher than in the adjacent states having such legislation.

Lloyd C. Halvorson, representing the 860,000 members of the National Grange, asked for the complete repeal of the Miller-Tydings Act. "The National Grange has a great history in the fight against monopoly," he stated. ". . . We are for laws that allow competition to keep prices down, not for laws that destroy competition or even restrict it—except as clearly called for to protect the public interest."

Quoting the research economist for the Grocery Manufacturers of America, he pointed to the relatively healthy condition of food distribution which is conducted on a 15% to 20% margin and the contrasting high markups in the drug field, made rigid by fair-trade laws. "Should farmers, workers and individuals generally whose health is in need of drug items be forced to pay a fixed price if a retailer would like to sell them for less?"

He added: "Farmers strongly resent being forced to pay $46.50 for an electrical appliance which is marked up from a wholesale cost of $30—a 55% markup—if another retailer would be able to sell it and come out with a good volume of sales and good profits with only a 30% markup —a price of $39. . . . Maybe a markdown on an item should really be looked upon as a form of advertising cost. It would not be engaged in if it did not bring customer results. It should not be forgotten that markdowns are a method of enticing the customers into stores and that it benefits the consumers much more than beautiful, enticing full-page ads. . . .

"If I buy tires, a Schick razor, a radio, I find out what the established price is, and I look around to find a lower price. If someone can make profit by selling more at a lower price, I buy there, and that is the way to raise the standards of living of the people. The only way we can mass produce in this country is to have mass selling, lots sold at a lower margin."

The CIO's stand

Donald Montgomery of the United Automobile Workers, speaking for the CIO, held that price maintenance laws were not an effective solution for the problems of the small retailer. "The more firmly the advertised lines are maintained at high prices," he said, "the more consumers will be encouraged to seek out equal or better substitutes at lower prices. To find those substitutes they will go to the chain stores, to Macy's, to the mail-order houses and to the large cut-price liquor stores. . . . Resale price maintenance is not only bad medicine for the consumer but is also a temporary and ineffective protection for the small and independent retailer."

What Fair Trade costs

Dr. Joseph M. Klamon, Professor of Marketing at Washington University (St. Louis, Mo.), contended that the Miller-Tydings Act, prior to the Supreme Court decision, represented the equivalent of a 10% to 12% sales tax collected by retailers and manufacturers of branded goods for their own benefit, and that the pending bills were "featherbedding" price-fixing on behalf of brand name manufacturers. Alluding to the recent tendency of supermarkets to carry drug products, he suggested that the high drug margins allowed these stores to undercut in other lines. The average profit on drug items was estimated as double that on food. The principal problem of the retail druggist in the future will, he felt, be this new-found competition which cannot be met by such restrictive legislation. The druggist needs better merchandising.

Present antitrust laws, he added, appear to be adequate to handle predatory price-cutting. There is, he said, not a single major price war in the country today. He applauded the St. Louis Chamber of Commerce and the law enforcement agencies for the State of Missouri for their opposition to fair-trade laws, which he characterized as "political devices designed to secure the votes of a small number of distributors and manufacturers interested in trade restraint on branded goods, at the expense of the entire consuming public." He estimated that American consumers, prior to the Schwegmann decision, paid 1500 million dollars to 1800 million dollars a year in higher prices, because of these laws.

Dr. Klamon quoted an editorial in *The Wall Street Journal* of February 7, 1952: "Partisans of 'Fair Trade' frankly say they are out to overturn the Supreme Court decision in practical effect. It is hard to see how they can restore the dangerous privilege of manufacturers or wholesalers to control the actions of thousands of merchandisers without their consent and even against their will. The Supreme Court has said that such a power is beyond the law and certainly it should be. . . ."

R. H. Macy's position

A number of retail groups, including department stores and aggressive independents, registered their opposition to Fair Trade. Q. Forrest Walker, economist for R. H. Macy & Co., held that private price fixing "spreads an economic umbrella over a favored few while the many stand out in the downpour of higher prices."

". . . 'Fair trade' laws," he said, "are not fair. They don't work in the manner claimed any more than Prohibition did. They are unenforceable, if only by reason of the American consumer's insistence on his right to buy at the lowest price he can find." The agitation, he suggested is promoted by a "well-heeled, highly organized, militant and extremely vocal minority of retailers, aided and abetted by

handful of self-interested manufacturers." The loss-leader problem was termed a mere smoke-screen and the talk of threatened small dealer bankruptcy, a bugaboo.

No manufacturer, Mr. Walker said, is entitled to "fix the price all the way down the line to the consumer" because of the presence of his trade name. Retailing costs differ widely and should be recognized in consumer prices. "When price-fixing contracts are enforced, you must pay Fifth Avenue prices for what you buy even though you wait on yourself, push a go-cart through the crowded aisles, pay cash, and carry home the package from the latest streamlined supermarket—unless, that is, you happen to shop in the free states of Vermont, Texas and Missouri, or the District of Columbia. If you shop outside these areas, you are just out of luck."

He alluded to the persistent problems of Macy's due to the discount house undercutting of fair-traded items which, in the pre-Schwegmann days, Macy's was reluctant to drop in price because of possible legal action. Indeed, he testified that when General Electric brought suit against Macy's in a 1950 fair-trade test case, more than 70% of the New York retail outlets carrying GE appliances were found to be selling at cut-prices in the New York area. The temporary period of extreme price competition in June 1951 had focused the hostility of price-fixing groups upon Macy's although these groups had long winked at the undercutting of the discount houses.

Julius Westheimer, president of Julius Gutman & Co., a Baltimore department store, furnished specific illustrations of price-fixed items which his company was now selling, not on a loss-leader basis, but on a more reasonable margin. This roster included: 63¢ Colgate Toothpaste for 51¢; $77.50 Community Silverplate set for $49.50; $3.75 Curity Diapers for $2.99 and 59¢ Bayer's Aspirin for 49¢. The question, he concluded, boils down to this: "What shall it be, fair prices for the many million people who make up the American public, or the misnamed 'Fair Trade' laws for the benefit of a relative handful of people who want a statutory system of price fixing?"

John Schwegmann, Jr., the New Orleans supermarket operator whose victory in the Supreme Court tripped off the current legislative battle, said: "We supermarket operators and millions of Americans need H.R. 4365 [repealing the Miller-Tydings Act] to escape from a manufacturers' dictatorship which can cause inflation as dangerous as the present national defense emergency."

CU's stand

CU's stand on this hotly contested issue is not that of a neutral. CU favors the repeal of the Miller-Tydings Act, and opposes any measure forcing "nonsigners" to maintain prices. Two years ago, we urged this view before the Joint Congressional Committee on the Economic Report. We believe that this position is concurred in by the overwhelming majority not only of consumers, but of farmer, labor and business groups. It likewise has received support from many influential business publications and newspapers.

At the same time we well appreciate that many of the protesting small retailers are beset with real difficulties—difficulties for which, unfortunately, they are seeking the wrong solution. The last decade has been one in which retailing bankruptcies have been low because of an expanding business volume, rising prices, and rising inventory values. This favorable result has had little to do with the presence or absence of resale price maintenance laws. Yet the small dealer quite rightly feels insecure, and often views the future with alarm.

Save in unusual cases, the small enterprise has not aggressively employed price competition or even efficient merchandising. He currently faces even greater selling competition due to the development of new integrated shopping centers and the growing accent on private brands of mail-order houses and chain groups. Were the small retailer to pit himself directly against the large units in price competition, he would frequently be in an advantageous position. Small-scale merchandising does not have to be high-cost merchandising. With greater and more personal service, with convenience of location, with flexible hours, he has distinct advantages. Flexibility in pricing might well insure his survival, not his downfall.

Yet today, many spokesmen of small business are seeking through fair-trade laws to erect a temporary dike against competition—a dike which, if successful, will only serve to build up the pressure of discount-house selling and of the private-brand competition of large chain and mail-order units.

British and Canadian studies have concluded that, in the long run, price maintenance is not beneficial to the retailer because guaranteed prices have a tendency to encourage too many people to go into a business. The subsequent rivalry for volume—denied an outlet in price competition—turned to increasingly expensive and wasteful competition in services. And as it becomes more and more difficult for the growing number of outlets to make a living in the trade, pressures arise for a law to limit the number of retailers.

Consumers have a fundamental interest in the preservation of a free, competitive economy. In a real sense, the survival of the small businessman is essential to continued competition. We should vigorously enforce our antitrust laws on his behalf.

Above all, we should keep flexibility in our distribution system, so as to give the conscientious and efficient merchant the opportunity to expand.

ECONOMICS FOR CONSUMERS

STATE RESTRAINTS ON COMPETITION

In two significant actions—one widely publicized in the press, the other hardly noticed, but both marking a trend for consumers to view with alarm—the 82nd Congress relegated to the states new powers to keep consumer prices up

By two actions in its last session, Congress granted state governments vast power over the prices of consumer goods. Unfortunately for the consumers, it was power, not to halt price rises, but, on the contrary, to prevent price decreases. There was a good deal of publicity about one of the two actions—the passage of the McGuire Bill, which restored to those state statutes known as "Fair Trade" laws the teeth which the Supreme Court had pulled the year before (see page 436). But there was almost nothing reported in the press about the other—an amendment to the 1952-53 Defense Production Act, which exempted price minimums set by state law from federal price control.

As many social scientists have pointed out, the average citizen knows regrettably little about state government these days, at least as it functions in fields affecting his economic interests. Technological developments in communication have tended to give an emphasis to national affairs to the exclusion of local and sectional. Since radio, television, magazines, and press services are themselves organized on a national basis, the most competent news reporting and analysis have been devoted increasingly to the affairs of the nation and withdrawn from the affairs of the states. Moreover, the few groups active in support of consumers' interests—notably, women's clubs and consumer organizations—are seldom as well represented (if at all) in state capitols as they are in Washington, D. C.

During the last quarter of a century, however, and especially since the depression of the Thirties, the pressures of organized business have been directed more and more powerfully at state legislatures. And state legislatures have, by and large, been receptive to demands for special privilege laws. The history of the so-called Fair Trade laws is a good case in point.

Most people have now forgotten that manufacturers of branded goods tried for years and years to get a Federal price maintenance law passed. The old Capper-Kelly bill, for example, was introduced every legislative year from 1914 until 1931 when, after finally passing the House of Representatives, it was defeated in the Senate. That same year, however, California passed a law granting the same price-fixing privileges at the state level which Congress had so stubbornly refused to allow at the national. This was the first state Fair Trade law. Its enactment provided a moral too obvious to be overlooked. The price maintainers took to the states. In seven years, 43 states had put the law on their books. Today all but three—Vermont, Missouri, and Texas—have made this type of price-fixing legal.

The non-signer clauses

These are the state statutes to which the last Congress restored a power which the Supreme Court had held (in 1951) to be in violation of Federal law: namely, the power of a state government to force every retailer, willingly or unwillingly, to abide by a retail price set in a contract between a brand manufacturer and one retailer in that state (see CONSUMER REPORTS, April 1952). What the Court said was that this so-called non-signer clause in state Fair Trade laws was in conflict with the Federal antitrust statutes when it forced him to abide by terms in a contract that he himself had not signed and did not want to sign. What the 82nd Congress did in passing the McGuire Bill was to exempt such non-signer clauses from our antitrust statutes. The purpose of the McGuire Bill, said Congress, was precisely "... to extend the minimum prices prescribed by such contracts and agreements to persons within the state even though such persons are not parties thereto. ..."

President Truman signed the bill one day before it would have died through a pocket veto. Political tipsters had predicted that he would not sign it; the fact that he did was taken as a stunning victory for the promoters of price maintenance, and was hailed as such in the advertising and trade press. But within less than a week the need for a yet-stronger price-fixing law in the states was being talked up in the same press. The present Fair Trade laws, according to the advocates of price maintenance, are unsatisfactory for two main reasons: 1) mail-order houses operating from the three states without such laws will be abl-

ECONOMICS

continued

ship into other states at prices below legal minimums; 2) Fair Trade price minimums may not be fully enforced.

The answer that price-fixers see for the first flaw in their victory is a drive to pass Fair Trade laws in the three hold-out states: such a drive is in preparation. The second problem is a knottier one for them. As the state statutes are now written, a retailer who sells below the price minimum can be hailed into court for doing so. However, since the manufacturer determines the price, writes the contract, and sees to it that at least one retailer in the state signs it —the whole affair is quite evidently the manufacturer's baby. He is the one who must bring suit against the offending retailer. If he fails to do so, then nothing happens.

There is a growing suspicion among Fair Trade enthusiasts that, in these days of still-heavy inventories and consumer price resistance, some brand manufacturers may sign up but do nothing about enforcing price minimums, at least not until inventories are cut back. Fair Trade promoters in *other* industries are looking with envy at the liquor business, which has dealt with this problem in a number of states by lobbying through amendments to liquor control laws making Fair Trade pricing compulsory in the state. The state is thus saddled with the responsibility for enforcement. The distiller has only to name the price. State police power takes care of the rest.

Federal ceilings vs. state floors

It is this trend toward passing the enforcement of fixed prices over to public officials that Professor E. T. Grether, probably the outstanding student of price maintenance in this country, has called "one of the most portentous events in the recent political history of states."* And it is this portentous trend which the national Congress further approved and encouraged in its amendment to the Defense Production Act mentioned earlier—the amendment which provided that no federal ceilings could be maintained below price minimums determined by states on the basis of state law.

It is doubtful that many Congressmen voted for this amendment with a full realization of the complicated network of controls that now exist at the state level. As a matter of fact, there does not exist any competent description, or even listing, of all the state-sponsored price-determining laws, boards, commissions, and marketing agreements which have multiplied so rapidly in the last few years. From studies that have been made by economists of conditions in particular states, from evidence in court cases, and from analyses of certain state practices (such as licensing of occupations), it is possible to draw some reliable generalizations, however, about these state extensions of political control over economic affairs.

* From *Changing Perspectives in Marketing*, University of Illinois Press, 1951.

The first and most obvious characteristic of such controls (and the one most detrimental to consumers) is that they operate on the principle of regulation by the regulated. Where the laws deal with pricing or other competitive activities in the sale of specific goods and services—liquor, milk, cigarettes, wine, dry cleaning, barbering, insurance selling, real estate selling, mortuaries, cemeteries, canned peaches, trucking, building, plumbing, etc.—the relevant sections of the control legislation have, without any exception known to CU, been proposed, lobbied through, and dominated in administration by the particular industry concerned. Where the laws are general and applicable to broad categories of goods, as is the case with statutes to prohibit below-cost selling, the drive to put them on the books was inaugurated by trade associations, and demands for their enforcement as well as pressure for funds to enforce them have come from the same sources.

"Little NRA Acts"

Laws against below-cost selling, most often known as Unfair Practice Acts or Unfair Sales Acts, are not to be confused with the Fair Trade laws, although both are price-protecting laws and both have been sponsored by more or less the same business groups. The present state Unfair Practice Acts derive straight from federal legislation, specifically, the old National Recovery Act (NRA) which was passed in the first year of the Roosevelt administration. For two years thereafter trade associations by the dozens trooped into Washington seeking price protection of one kind or another; and nearly two out of every three of the trade practice codes issued by NRA contained a prohibition against below-cost selling.

Then, in 1935, the Supreme Court declared NRA unconstitutional. All the codes, and with them the price prohibitions, were outlawed. Again it was California which took over. In that same year California passed a bill known locally as "The Little NRA Act." Its official title was the Unfair Practice Act of 1935. Today, according to OPS, 30 states have such laws on their books. What they provide, generally speaking, is that it is unlawful for anybody to sell any goods below what he has paid for them plus whatever it has cost him to handle them.

This last provision, known as "the cost of doing business" clause, is variously defined. Twenty-three states specify this cost as a percentage of what the retailer, himself, pays for the goods; the percentages vary from 6% to 12% in the different states. In some cases, however, the laws provide that in lieu of a percentage an industry survey may be admitted as evidence of the cost of doing business. In the seven states that do not mention a percentage, either industry surveys or a seller's own records are usually taken as the cost evidence.

These below-cost laws cover the whole range of consumer goods. Where costs are defined by an industry survey, the effect of the recent amendment to the Defense Production Act is to allow, through state law, a method for continually upping price floors through new surveys. Thu price freezes or federal price ceilings are potentially ci culated. Both Congress and OPS have made it clea

the 1952 amendment shall apply only to those laws that were being enforced prior to July 1, 1952. And OPS takes the unofficial view that a good many of the laws were not actually being enforced. It may be, however, a good deal easier for state law enforcement officials to furnish evidence of enforcement than for OPS to prove failure in enforcement. What's more, this emphasis on enforcement is almost certain to mean that, in coming sessions of state legislatures, the drive for both stricter enforcement and more funds to assure such enforcement will be immeasurably stepped up. In other words, where such laws *have* been dormant in the past, it is quite likely that they will be revived now.

Price fixing by licensing boards

Even more damaging to consumers, potentially, is price-fixing by state boards and commissions which are empowered to handle or control specific commodities or services.

The generalized price-floors established by Unfair Practice laws must be enforced by court action. And such action sometimes results in publicity which, in turn, may arouse community resentment against state officials bringing the suit. The boards and commissions setting prices for specific goods or services, however, have a more effective punitive power over sellers. That power resides in their right to grant, police and revoke the license under which a dealer does business. Here is the hard core of compulsion to keep retailers in line in those states where minimum prices are dictated by state law. Furthermore, unlike a court suit, a license revocation, which often takes place at a board meeting unannounced in the general press, is an action that seldom receives publicity.

Some idea of the far-reaching implications here is given by a recent (June 1952) study made by the Council of State Governments, "Occupational Licensing Legislation in the States." According to that analysis, 73 different kinds of licenses are granted by state governments to control business and professional activities, and for each licensing activity there is typically a special control board. Among the sellers covered are automobile dealers, pest controllers, commercial photographers, yacht and ship brokers' salesmen, building contractors of all sorts, plumbers, and opticians, to say nothing of the list of professions running all the way from tree surgeons and horseshoers to osteopaths and lawyers.

The first chapter of this study, titled *Nature of the Problem*, opens with a small story:

> Not long ago the Governor of a midwestern state was approached by representatives of a particular trade anxious to enlist the Governor's support in securing passage of legislation to license their trade.
>
> "Governor," the men said, "passage of this licensing act will ensure that only qualified people will practice this occupation: it will eliminate charlatans, incompetents, or frauds; and it will thereby protect the safety and welfare of the people of this state."
>
> The Governor, from long experience, was somewhat skeptical. "Gentlemen," he asked, "are you concerned with advancing the health, safety and welfare of the people under the police powers of this state, or are you primarily interested in creating a monopoly situation to eliminate competition and raise prices?"
>
> The spokesman for the occupational group smiled and said, "Governor, we're interested in a little of each."

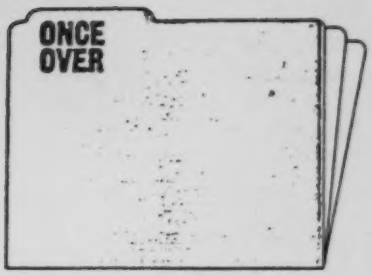
On the basis of the performance of the special licensing and control boards that have been investigated, what the spokesman meant was approximately what the French restaurant owner meant by horsemeat-and-rabbit stew: he meant, he explained, that he had used one horse and one rabbit.

A third type of state-sponsored monopoly control that directly affects prices lies in the laws generally called marketing acts. They deal, ostensibly, with agricultural products. They are typically dominated, however, by processors or handlers of agricultural goods. These laws are state versions of federal agricultural marketing laws but they usually go much further in their powers. In California, for example, where this type of legislation is most fully developed, marketing boards for close to 30 different products are empowered to control the supply of produce that may be sold. The purpose is to limit supply so that it will balance demand *at a given price*—that is, so that the supply will not bring the price down. This year, for example, 15% of both the cling peach and almond crop were removed from the market. Here, too, state police power enforces the decisions of the boards, which are made up of processors and growers.

Whose control?

And these are the very same processors and growers who, along with the Farm Bureau Federation, and the meat packer and fruit canner trade associations, flood the nation with alarms over government interference in business. The difference between government interference at the national level, which they oppose, and that at the state level, which they support, appears to be simply that in the states these boards are manned by the people they are better able to control.

It is not control, then, but *whose* control that is the issue at stake. And it is not price control but *price ceilings* that are opposed by these pressure groups. Price minimums are avidly desired.



FAIR-TRADE LAWS ARE FINALLY PUT TO REST

The fair-trade laws in the 21 states that still have them will die on March 11. They won't be missed.

Fair-trade laws permit manufacturers to fix retail prices for brand-named goods. Merchants who sell below the price set by the manufacturer can be prosecuted, fined, and even jailed.

Ordinarily, any price-fixing is a violation of Federal antitrust laws. But in 1937 and again in 1952 Congress granted exemptions that permitted state legislatures to approve retail price-fixing by manufacturers. Fair trade was supposed to shield small merchants from cutthroat competition with large discount stores. At one time, 45 states had fair-trade laws in effect.

One by one, states began repealing the laws because their only effect was to hold retail prices at artificially high levels—the corner store would survive or fail for other reasons. According to the U.S. Department of Justice, consumers are paying $2.1-billion too much each year as a result of the fair-trade laws. In December, Congress finally repealed the Federal laws that permitted states to enact the price-fixing statutes, and President Ford signed the repeal into law.

In the 21 states where fair-trade laws still exist, nullification could result in lower prices for products that have been fair-traded. These include audio components, television sets, appliances, mattresses, kitchenware, jewelry, bicycles, and prescription drugs.

But some manufacturers have become accustomed to price protection for their goods. They might attempt new ploys to prevent price competition at retail after fair trade is gone. One such ploy is exclusive dealer franchising, which reduces the number of possible competitors in an area and can exert pressure on franchisees to adhere to "suggested retail" prices or lose their franchise. Exclusive franchising is already making headway in the audio business (see "Good-Bye to Good Buys in Audio Equipment?" CONSUMER REPORTS, November 1974).

The states with fair-trade laws that will fall are: Arizona, Delaware, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Virginia, West Virginia, and Wisconsin.

FEBRUARY 1976

Senator METZENBAUM. Thank you.

Mr. First, we are happy to welcome you, sir.

Mr. FIRST. Thank you, Senator Metzenbaum. I am pleased to be here today to testify in favor of this legislation. I completely endorse its two objectives; first, to overrule the *Monsanto* case and, second, to legislatively affirm current law to the effect that vertical price-fixing is per se unlawful.

Senator METZENBAUM. Mr. First, I wonder if I may interrupt you for a minute.

Mr. FIRST. Sure.

Senator METZENBAUM. Would you just tell us a bit about yourself, where you teach and what you teach?

Mr. FIRST. Yes. I am Professor of Law at New York University Law School and I specialize in antitrust, and I have written some articles and have coauthored a casebook in the field. I have also been with the Department of Justice Antitrust Division in a prior life, but now I just play academic.

Senator METZENBAUM. Thank you.

Mr. FIRST. I would like to emphasize three points in my testimony today, but first, I would like to start actually with a footnote. The footnote is this: I think there are probably some langauge changes which could improve the bill, as drafted. I suggested one at the end of my statement and I would be glad afterwards, if anyone is interested——

Senator METZENBAUM. I suggest that you meet with my staff to work those out.

Mr. FIRST. I would be glad to do that. Thank you, Senator.

The first point of my testimony is that it is my view that *Monsanto* was incorrectly decided. The evidentiary rule adopted in *Monsanto* keeps evidence from the jury, for fear the juries cannot distinguish between legitimate and illegitimate distributor complaints, and that juries will have difficulty distinguishing between dealer terminations that are done because the plaintiff is a price-cutter upsetting its rivals or because the plaintiff is not doing a good job.

I think, though, that dealer termination issues must be among the easiest issues in the antitrust laws that we ask juries to consider. They are certainly easier than, for example, considering the question whether IBM monopolized the mainframe computer industry, or even whether firms are pricing below average variable cost.

Monsanto's strict evidentiary rule, in addition, is done out of a desire to give maximum freedom to those manufacturers who pursue a marketing strategy of high resale prices and premium distribution services.

I think that if we are to craft our evidentiary standards with an eye toward ultimate competitive impact, we ought to tilt the rules in favor of the other direction. I would incline in favor of an open, competitive retail marketplace where consumers have full choice between discounters and premium distributors.

We should make it harder to cut off discounters rather than easier to maintain a high-price distribution system with expensive pre- and post-sale services that many consumers do not want.

The second point: There is a general argument that *Monsanto* should be left to common law development. I would like to point

out, however, that there is a long tradition of congressional overruling of Supreme Court opinions. The oldest one, of course, is the Clayton Act itself, which was passed in 1914 to overrule the Supreme Court's rule of reason decision in its 1911 *Standard Oil* case.

I would choose the legislative approach in this case as well. I do not think we need time to see how the Monsanto rule will work out in the business world or in the courts. The post-Monsanto evidence is, in fact, very clear that lower courts have enthusiastically pushed Monsanto to its limits. A good example of this is the *Belk* case which I discuss in my statement.

Unless Congress acts quickly, I think we will witness the loss of many retail discounters, and these discounters, I note, in addition to providing low-cost prices in particular transactions, also provide general downward pressure on manufacturer prices because they induce competitors to seek lower prices from suppliers. I see no reason why we should await the working out of the common law system and deprive consumers of these benefits.

The third point I would like to make is that although I do support the provision of the legislation which reaffirms the current rule on vertical price-fixing, I note that this is, in fact, current law.

In fact, the Supreme Court has carefully noted that vertical price agreements are to be treated differently from vertical non-price agreements and that the former retain their per se status.

I think it unlikely, frankly, that even a judicially conservative court, at least the Supreme Court, would place vertical price-fixing into a rule of reason category. At most, I think the Court may narrow the current rule, but I think that this could occur even if Congress enacted the proposed legislation.

In conclusion, Senator, I would urge the passage of the first part of the bill, perhaps with some modifications in language. The second part of the bill is worthy, but not nearly as necessary.

Thank you.

[Prepared statement follows:]

STATEMENT OF HARRY FIRST
PROFESSOR OF LAW
NEW YORK UNIVERSITY SCHOOL OF LAW

on

"The Retail Competition Enforcement Act of 1987"
S.430, 100th Cong., 1st Sess.

Before the
Senate Judiciary Committee

April 23, 1987

Mr. Chairman and members of the Committee. I am pleased to be here today to testify for, rather than against, proposed antitrust legislation. The bill under consideration, "The Retail Competition Enforcement Act of 1987," has two objectives, which I completely endorse: First, to legislatively overrule the Supreme Court's decision in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984); second, to legislatively affirm current law to the effect that vertical price-fixing agreements are per se unlawful under Section 1 of the Sherman Act.

I

It is my view that Monsanto was incorrectly decided. In Monsanto the Supreme Court rejected the rule, followed in a number of Circuits, that a jury could infer a resale price-fixing agreement from proof that a manufacturer terminated a dealer following competitor complaints about price-cutting. I think that the Court's decision was mistaken on two levels.

First, I think that the decision improperly usurped the jury function. As a factual matter, I do not find it unreasonable for a jury to infer agreement in these circumstances. Those who oppose submitting such a case to the jury make two arguments. First, they suggest that manufacturers have a legitimate need for information from their distributors, but that juries are unable to distinguish between legitimate and illegitimate distributor complaints. Second, they argue that juries will have difficulty distinguishing between dealer terminations done because the plaintiff was a discounter upsetting its rivals, or done because of poor performance.

It is my feeling, however, that these are among the easiest antitrust questions we pose to juries. It is certainly easier to

understand the reasons for a dealer termination than it is to understand whether IBM monopolized the main frame computer industry, or whether Xerox monopolized the plain paper copier industry, or even whether a firm is selling below average variable cost.

No one is suggesting that competitor complaints of price-cutting entitle a plaintiff to a directed verdict. Nor is anyone suggesting that manufacturers are barred from explaining their reasons for a termination, reasons which, with proper counseling, should be well-documented in the company's files. The question is simply whether we will allow the jury to decide the facts.

My second level of criticism of Monsanto is antitrust policy. Underlying Monsanto is a preference for allowing maximum freedom to those manufacturers who wish to pursue a marketing strategy of high resale prices, pursuant to which the manufacturer will allow its distributors to "earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that 'free riders' [i.e., discounters] do not interfere." Monsanto, 465 U.S. at 762-63. If we are to craft our evidentiary standards with an eye toward ultimate competitive impact, however, I would prefer tilting the rules in the other direction. I would incline in favor of an open, competitive retail marketplace, where consumers have full choice between discounters and "premium" distributors. We should make it harder to cut off discounters, rather than easier to maintain a high price distribution system with expensive pre- and post-sale services which many consumers might not otherwise prefer.

II

For me, the more powerful argument against the legislation is the one which urges that Monsanto be left to common law development. As a general matter, I think that we have done well by the common law evolutionary process in the development of antitrust rules. Indeed, the courts' development of rules relating to non-price vertical restraints is testimony to this.

Nevertheless, we also have a long tradition of Congressional

"overrulings" of Supreme Court antitrust opinions. The oldest example, of course, is the Clayton Act itself, passed in 1914 in response to the overly expansive rule of reason articulated by the Supreme Court in the Standard Oil case. Another example is the Celler-Kefauver Act passed in 1950 to counter the cumulative weight of Supreme Court decisions in the merger area. These statutes are precedent for Congressionally broadening the scope of the antitrust laws in the face of narrowing Supreme Court decisions. In addition, there are many examples of statutes which have narrowed the effect of Supreme Court antitrust decisions. The McCarran-Ferguson Act exempted the insurance industry from antitrust control after the Supreme Court held the industry was covered, see United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1942); carrier rate bureaus were legalized after the Supreme Court's decision in Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945); and the Newspaper Preservation Act was passed in response to the Court's decision in Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

I would be in favor of choosing the legislative approach for this case as well. I do not think that we need time to see how the Monsanto rule operates out in the business world. It is fairly clear that the rule will give manufacturers more freedom to cut off discounters, and I do not think that this will likely have some beneficial competitive effect of which we are now unaware. Further, the post-Monsanto evidence demonstrates that the lower courts have enthusiastically pushed Monsanto to its limits. Indeed, in more than half the post-Monsanto decisions, the courts have granted the defendant's motion for summary judgment or directed verdict. See Flynn, The "Is" and "Ought" of Vertical Restraints After Monsanto Co. v. Spray-Rite Serv. Corp., 71 Corn. L. Rev. 1095, 1102-03 (1986).

A good example of Monsanto's growth is the Fourth Circuit's decision in Garment District, Inc. v. Belk Stores Services, Inc., 799 F.2d 905 (4th Cir. 1986). In that case Jantzen, acting on clearly communicated complaints from a retailer selling at a 100% markup, terminated a competing retailer selling at a 30-35%

markup. No procompetitive justification was offered; Jantzen only wanted to keep the complaining retailer happy. There was evidence of meetings, a follow-up letter from Jantzen to the complaining retailer, and a pretextual termination based on "image." Nevertheless, relying on Monsanto, the court of appeals affirmed the district court's grant of a directed verdict for the defendant.

I think that unless Congress acts quickly, we will witness the loss of a great many retail discounters. We should not forget that, besides giving consumers lower prices in particular transactions, these discount retailers often provide general pressure on manufacturer prices by inducing their competitors to seek lower prices from suppliers. In addition, these discounters may induce the creation of private label brands, as manufacturers and other retailers seek ways of providing products which are both price and service competitive. I see no reason to deprive consumers of these benefits while we await the working out of the rules in the common law system, particularly given the direction in which the courts are now headed.

III

I similarly support the provision of the legislation reaffirming the current rule that vertical price-fixing is per se unlawful. This has been the antitrust rule since the Supreme Court's 1911 decision in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), and is the rule today. Some might argue that the legislative adoption of the per se rule would interfere with evolutionary experimentation in an uncertain area. I would point out, however, that we had a thirty-eight year "experiment" with legalized resale price-fixing, beginning with the Miller-Tydings Act of 1937 and ending with the Consumer Goods Pricing Act of 1975. Congress' decision to end "fair trade" in 1975 correctly reflected the view that resale price fixing restrains competition and leads to higher prices.

I must note, however, that the case for enacting "confirming" legislation in this area is weaker than the case for overruling Monsanto. The Supreme Court has carefully noted that

vertical price agreements are to be treated differently than vertical non-price agreements, and that the former retain their per se status. See Monsanto, 465 U.S. at 763; Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 n.18 (1977); cf. Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982) (Rehnquist, J.). In light of the Consumer Goods Pricing Act, and established precedent, I think it unlikely that even a judicially conservative court would place vertical price-fixing into the rule of reason category. At most, the Court may narrow the rule; but this could occur even if Congress passed the proposed legislation. Thus, although I favor the objectives of the legislation, I could very well understand if Congress felt the legislation was unnecessary.

In conclusion, I would urge the passage of the first part of the bill, perhaps with some revision of its language.[1] The second part of the bill is worthy, but not nearly as necessary.

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[1] I would suggest making clearer whether the termination "in response" to the complaint is a temporal or causal relation. I would prefer the former; but clarity would avoid unnecessary litigation.

Senator METZENBAUM. Thank you very much, Mr. First.

Mr. Abrams, to your knowledge, how many vertical price-fixing cases have the Department of Justice and the Federal Trade Commission filed since 1981?

Mr. ABRAMS. Well, Senator, they have both been extremely inactive in this area of antitrust enforcement. To my personal knowledge, the Antitrust Division of the Department of Justice has not filed a single RPM case from that time to now.

Perhaps the FTC has filed a single case, a wallpaper case, in that period of time. I think that displays the inactive role of both arms of the Federal Government for enforcement of these important Federal laws.

Senator METZENBAUM. And have the State attorneys general been filing vertical price-fixing cases?

Mr. ABRAMS. They have. In this area, in the merger area, in so many areas of antitrust where there has been a disappointing failure on the part of the Federal agencies to meet their responsibility, the States have stepped in to fill that breach. I will give you just a couple of examples out of New York, which is reflective of I think what has happened across the country.

We had major investigations of milk price-fixing in New York State. It culminated in 47 convictions of the largest milk companies selling milk in the downstate area that covers a population of over ten million people, and we received over $8 million in damages that is going to be refunded to members of the public and to the treasury of the State of New York in damages and penalties as a result of the enforcement efforts of the State of New York.

Most recently, we had a case against the major——

Senator METZENBAUM. Let me just ask you the bottom line on that. Was the bottom line that the people of New York wound up getting milk at a lower price?

Mr. ABRAMS. Yes. That gets a little more complicated because we have got an anti-competitive statutory framework which we are trying to modify. There is a protectionist licensing statute for the sale and distribution of milk in New York, and that is my current legislative fight in Albany at the present time.

But there is no question that as a result of our enforcement action, we eliminated the actual conspiracies of dealers and distributors sitting together in diners, four or five of them, and deciding what the price of milk was going to be. So I think it eliminated that kind of overt activity, and hopefully our legislative struggle this year will end the framework which still keeps the price of milk artificially high.

The second example of RPM enforcement that we recently had in New York, and it is reflective, too, of how the States have stepped into the breach and the failure of the feds to give protection across the country, was against Minolta where there was the dictation of price for the new camera line that Minolta came out with.

It eventually was adopted as a settlement of some 37 different States across the country involving hundreds of thousands of consumers, perhaps up to $7 million in remedies and damages for consumers across the country.

So the States have attempted to step into the breach, but, of course, this is the primary responsibility of the Federal Government. They have got the resources, they have got the power under the law, and it is disappointing to us that they are sitting on their hands.

Senator METZENBAUM. Do some lower court decisions interpreting the *Monsanto* case actually contradict traditional conspiracy law, Professor First?

Mr. FIRST. Well, yes, I think so, Senator. I think the *Belk* case really is an excellent example of that. There, in fact, you had meetings between the distributor and the manufacturer, Jantzen. You had a letter going from Jantzen to the distributor saying we have taken care of it.

If this is not agreement, it is hard to see what could constitute agreement. So I think that courts are pushing beyond Monsanto in a way that is very injurious to enforcement of the antitrust laws.

Senator METZENBAUM. Is that the *Belk* case you are talking about?

Mr. FIRST. This is the *Belk* case, yes, a Fourth Circuit decision.

Senator METZENBAUM. And that case, as I understand it, was that a full-price store relegated the manufacturer's goods to the bargain basement and did not invite the manufacturer to its trade show. The manufacturer wrote a letter referring to the discounter's low prices as a situation that should not exist, that exists due to a mistake on our part, and promising to make every effort to see that it is rectified.

The full-price store official attempted to destroy all copies of the correspondence and it wound up that the discounter was terminated.

Mr. FIRST. That is quite right.

Senator METZENBAUM. And then what happened in that case?

Mr. FIRST. The Fourth Circuit Court of Appeals held that this was an issue that could not go to the jury; that there was no factual dispute under Monsanto; that as a matter of law this was not joint action violative of Section 1; and affirmed a judgment for the defendant. That is outrageous.

Senator METZENBAUM. It seems to me that that makes a clear and convincing case as to why we need this legislation, and I will be interested in some of the subsequent witnesses as to how they can justify permitting that kind of action to occur.

Mr. Silbergeld, you mentioned the Bureau of Competition, and I said to myself, gee, that is interesting. I have not heard of the Bureau of Competition in the last several years. Is that still an operating arm of the Federal Trade Commission? [Laughter.]

I used to hear about them regularly. Are they totally out of business?

Mr. SILBERGELD. It is there, it is consuming resources. I do not believe that what is coming out of it justifies the use of those resources, Mr. Chairman.

Senator METZENBAUM. I do not even ask the question facetiously; I am being totally honest. I have not heard of any action from the Bureau of Competition in at least 3 or 4 years.

Mr. SILBERGELD. I think there is a penalty in that bureau for making the headlines.

Senator METZENBAUM. There is a penalty, I see.

Well, thank you very much, gentlemen. I appreciate your cooperation and we look forward to working with you. Professor First, if you have some suggestions to make, we would certainly be glad to hear from you.

Mr. FIRST. Thank you, Senator.

Senator METZENBAUM. Thank you.

The next panel is Mr. A. Robert Stevenson, Vice President of K Mart, on behalf of the National Mass Retailing Institute, Washington, D.C.; Mr. Monroe Milstein of the Burlington Coat Factory of New York; Mr. Joe Sims, Jones, Day, Reavis and Pogue, on behalf of the Section of Antitrust Law of the American Bar Association; Mr. Joseph Creighton, Vice President and Senior Counsel of the Harris Corporation, on behalf of the National Association of Manufacturers; and Mr. Joseph Alioto, Jr., of San Francisco. We are happy to welcome all of you.

At this point, I will put two letters in the record, one from the AFL-CIO supporting S. 430, and the other from various consumer groups, Public Citizen's Congress Watch and Consumer Federation of America.

[Information follows:]

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

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LEGISLATIVE ALERT!

April 22, 1987

The Honorable Joseph Biden, Jr., Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the AFL-CIO, I want to express our support for S. 430, "The Retail Competition Enforcement Act of 1987." I respectfully request that this letter be made part of the record for the April 23, 1987 hearing.

The AFL-CIO has had an abiding interest in consumer oriented legislation in behalf of its 13 million union members and their families who comprise a significant portion of the buying public. Our support for S. 430 is consistent with our longstanding policy opposing resale price maintenance laws, under whatever label they may be offered, whether "fair trade," "quality stabilization" or other misleading titles. In our judgment, such laws, by allowing private manufacturers to fix wholesale and retail prices on branded merchandise, inevitably mean higher prices for workers, their families and consumers in general.

Because of our policy, the AFL-CIO supported legislation that became law in 1975 which repealed the federal antitrust exemption for so-called fair trade laws, then in effect in 33 states. At that time, it was estimated that these regressive laws cost consumers over $2 billion annually.

However, while current law states that vertical price-fixing conspiracies between product manufacturers and retailers are per se illegal, the Department of Justice has not brought one vertical price-fixing case during the last six years. For this reason, it seems appropriate that Congress reaffirm the principle that vertical price-fixing is per se illegal.

S. 430 would accomplish this purpose by codifying current law. In addition, the bill would clarify the evidentiary standard for establishing the existence of vertical price-fixing agreements so as to facilitate proof of resale price maintenance.

For these reasons, the AFL-CIO believes that S. 430 would promote retail competition to the benefit of millions of wage earners in their capacity as buyers of consumer products sold at retail. The AFL-CIO therefore urges that the Committee give this legislation its expeditious approval.

Sincerely,

Robert M. McGlotten, Director
DEPARTMENT OF LEGISLATION

c: Members of the Senate Judiciary Committee

March 19, 1987

Honorable Howard M. Metzenbaum, Chairman
Subcommittee on Antitrust, Monoplies and Business Rights
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

The purpose of this letter is to express our strong support for S. 430, the "Monsanto" bill, that you introduced with Senator Bill Bradley, Senator Warren B. Rudman and Senator Paul Simon on February 2, 1987.

Consumers pay lower prices when there is healthy retail price competition. By definition, vertical price fixing precludes any price competition at the retail level and is therefore directly contrary to the interests of the purchasing public.

Vertical price fixing is so harmful to consumers that the Supreme Court has consistently declared it per se illegal since 1919. In recent years, the Antitrust Division of the Justice Department, whose duty it is to enforce the law against retail price fixing, has not only failed in its responsibility to enforce the law, but has attempted to undermine the law itself by urging the courts to adopt a "rule of reason" approach in place of the per se rule. Congress has reacted with a number of resolutions and appropriations cut-offs that clearly reflect Congress' support for full enforcement of existing law; however, there has been no detectable response on the part of these law enforcement authorities.

In addition, the Supreme Court's Monsanto decision established an ambiguous evidentiary standard in cases in which a supplier terminates a discounter "in response to" complaints of full price dealers who operate in the same market. Several lower court decisions have misinterpreted Monsanto, putting a virtually impossible burden on plaintiffs.

S. 430 addresses these twin problems by codifying the per se rule and clarifying the showing a plaintiff must make in order to reach the jury. We believe these provisions are both moderate and appropriate.

Finally, we believe that the failure to enforce the law may create an atmosphere under which vertical price fixing and the concomitant termination of discounters may soon be regarded by some as an acceptable business practice. Although this view is clearly incorrect, its widespread adoption across the country could well cause untold damage to consumers and to the competitive system. Therefore, we urge you to press for expeditious enactment of this necessary legislation.

Very truly yours,

Gene Kimmelman
Legislative Director
Consumer Federation
of America

Joseph Goffman
Acting Director
Public Citizen's
Congress Watch

cc: Senator Bill Bradley
Senator Warren Rudman
Senator Paul Simon

Senator METZENBAUM. We are very happy to hear from you, gentlemen. Mr. Robert Stevenson, for some reason we have you listed first, so we are happy to hear from you first, sir. We have a 5-minute rule, as you know, for each witness.

STATEMENT OF A PANEL CONSISTING OF A. ROBERT STEVENSON, VICE PRESIDENT OF GOVERNMENT AND PUBLIC RELATIONS, K MART CORP., ON BEHALF OF THE NATIONAL MASS RETAILING INSTITUTE; JOE SIMS, JONES, DAY, REAVIS, AND POGUE, ON BEHALF OF THE SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION; MONROE G. MILSTEIN, CHAIRMAN OF THE BOARD, BURLINGTON COAT FACTORY WAREHOUSE; JOSEPH R. CREIGHTON, VICE PRESIDENT AND SENIOR COUNSEL, HARRIS CORP., ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS; AND JOSEPH ALIOTO, JR., ATTORNEY, SAN FRANCISCO, CA

Mr. STEVENSON. Thank you very much, Senator. I appreciate the opportunity of being here today. My name is A. Robert Stevenson. I am Vice President of Government and Public Relations for the K Mart Corporation. K Mart has over 2,200 discount stores throughout the United States and we sell brand name merchandise at prices below manufacturers' suggested retail prices.

I am representing today the National Mass Retailing Institute, which has 125 discount company members with over 20,000 stores in 50 States. We have filed a statement which goes into more detail than would be permitted today and I hope that you would have a chance to review it.

Senator METZENBAUM. Your statement will be included in the record.

Mr. STEVENSON. Thank you very much.

We feel that the law is absolutely clear on the prohibition of resale price maintenance per se and the law is an economic bill of rights for consumers. Collaterally, it is also a fundamental commercial right, especially for retailers in their ability to set retail prices without coercion.

Based on years of fair trade experience, the consumer is saving about $28 billion a year, according to our estimates. If these laws are enforced, at K Mart alone, the savings could be as much as $1 billion.

Now, Congress in 1975 recognized the high costs of fair trade laws and resale price maintenance. It raises the price to consumers, adds to inflation, impedes the efficient development of retail formats, provides unnecessary expenses, adds to retail business failure, and it promotes horizontal-type price fixing.

In 1983, our Chairman, Bernard Fauber, testified before the Congress and many industry witnesses, including myself, have testified since then. We have been very encouraged by the Congress' support of our efforts in trying to enforce the laws against resale price maintenance.

During this period, the Federal agencies that are charged with enforcing the law have been inactive and the burden has more and more fallen on retailers for enforcement efforts.

Today, there are substantial evidentiary problems for retailers enforcing the law in this area, particularly after the *Monsanto* cases and the court cases that have subsequently been decided.

S. 430 would define conspiracy in retail price maintenance the same as in other cases of criminal and civil conspiracy and we think this is a fair approach.

If a manufacturer, acted in response to a complaint from a competitor and terminated a discounter, S. 430 would permit and not compel a finding of conspiracy. If the rule is otherwise, consumers as a practical matter would lose the benefits of competition. Needing more than termination in response to price complaints is a bad rule of law since lower courts have dismissed cases where evidence strongly suggested retail price maintenance.

K Mart Corporation is a discounter and we are not immune to terminations, and the terminations almost certainly come from the urging of K Mart competitors.

S. 430 would permit a manufacturer, however, to make a presentation to a Jury explaining lawful unilateral reasons for termination. Also, S. 430 would not prohibit a Judge from giving a directed verdict for a defendant if he or she concluded that no Jury would find a conspiracy.

By only having an inference established, you are just moving towards making the defendant manufacturer come forward with other explanations.

The manufacturer today must bear some responsibility in the area of retail price maintenance. Certainly this was the rule prior to Monsanto and we are not requiring any new test other than what the law was previously to Monsanto. K Mart believes that consumers are the best judge of value and that value means the quality of the product, the store's reputation and the price and, all things being equal, the consumer would go for the lower price.

We urge Congress to adopt S. 430 to protect the freedom and the pocketbook of the American consumer, and we ask for fairness in the evidentiary rules on resale price maintenance.

Thank you.

[The prepared statement of the National Mass Retailing Institute follows:]

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**STATEMENT OF NATIONAL MASS RETAILING INSTITUTE
SUBMITTED TO THE SENATE JUDICIARY COMMITTEE
ON S. 430**

**A Bill to Amend the Sherman Act
Regarding Retail Competition**

The National Mass Retailing Institute ("NMRI") is honored to present this statement to the Senate Judiciary Committee on S. 430, a bill of vital importance to United States consumers. The bill is intended to clarify Congressional intent on the per se illegality of resale price maintenance. If enacted, this bill will lighten the substantial and unfair burden of proof presently imposed on antitrust plaintiffs under the Monsanto case in dealer termination litigation. The bill will also affirm that an agreement to "charge or maintain a price level, including a minimum or maximum price" is illegal -- antitrust violators cannot escape liability by the technical argument that there has been no explicit agreement on a specific price.

NMRI

The National Mass Retailing Institute is a trade association representing over 125 discount retailing chains which operate over 20,000 stores in all 50 states. Our members' sales represent a majority of the $126.1 billion per year discount industry. In many states, discount sales are a full one-fifth of the total retail sales made. Discount Store News, July 21, 1986, p.29.

NMRI stores operate in all states of the United States under a simple, but powerful, marketing philosophy: discount retailers sell a high volume of goods at prices generally well below manufacturers' suggested list prices, the prices often charged by manufacturers' authorized dealers.

The discount retail industry has enjoyed explosive growth in the last two decades. Indeed, studies indicate that the dollar volume of sales made by surveyed discount stores increased by 3400% from 1960 to 1985. The True Look of the Discount Industry, 26 Discount Merchandiser 37, 43 (1986). The explanation for that growth is simple: American consumers have turned to discount stores because those stores offer an attractive blend of low prices, desired products, and valued services.

Because discount retailers and consumers benefit from a retailer's right to offer low prices, NMRI is vitally interested in rules of antitrust law which not only prohibit resale price maintenance ("RPM"), but which also permit a victim of RPM to bring, and to win, antitrust suits. The discount industry owes its success, and its survival, to a retailer's right to market brand-name goods at competitive prices; access to the judicial process to vindicate this right is essential. S. 430 permits a victim of an antitrust conspiracy to challenge the conduct in court and, in so doing, protects consumers. S. 430 also clarifies that an RPM agreement may be found even if there is no explicit agreement to charge a specific price -- an RPM agreement may consist of a commitment to a price level, including a minimum or maximum price.

The Issue: Private Enforcement of the Rule Against Resale Price Maintenance

Many long-established and venerable antitrust principles have been under assault in the last six years by the Antitrust Division of the Justice Department and the Federal Trade Commission. No rule of law has been more buffeted then the rule that Resale Price Maintenance ("RPM") is per se unlawful.

Resale Price Maintenance -- the practice by which a manufacturer requires its distributors to agree to charge a fixed price for a good or service -- has been a per se violation for

over 70 years. And, thanks in large measure to a vigilant Congress, the per se rule has largely survived the frontal attack of recent antitrust enforcement officials. Although Federal government officials have stopped bringing government RPM cases, these officials have not yet been able to obtain a wholesale repeal of the per se rule. But, by promulgation of Vertical Restraints Guidelines, by constant speech-making, by intervention in private actions, and by abdication of enforcement responsibility, antitrust enforcement officials have encouraged the erosion of the per se rule.

Prompted in large part by antitrust enforcers' views, certain courts have done some damage to the per se rule. For example: (1) relying on the Monsanto opinion,[1] courts have made it very difficult, if not impossible, for private plaintiffs to prove the existence of a resale price maintenance conspiracy and (2) courts have limited the kinds of conduct which are subject to the per se rule. S. 430 addresses these erosions in the per se rule by building a Congressional "retaining wall" -- a wall which reclaims some ground lost to proponents of relaxed antitrust enforcement and fortifies the per se rule against future erosion.

1/ Monsanto Co. v. Spray-Rite Service Corp., 104 S.Ct. 1464 (1984).

(1) Resale Price Maintenance And the Per Se Rule: A Brief History

Resale Price Maintenance was first deemed to be illegal per se in a 1911 Supreme Court case, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). The court reasoned that all participants involved with the distribution of goods should be accorded freedom to make business decisions, including price decisions. Simply because a manufacturer makes the product and initiates the distribution scheme "it does not follow [that] ... he may impose on purchasers every sort of restriction." 220 U.S. at 404. The court concluded that "[Dr. Miles] having sold its products at prices satisfactory to itself, the public is entitled to whatever advantage maybe derived from competition in the subsequent traffic." Id.

The ruling in Dr. Miles -- that resale price fixing is per se illegal -- has been affirmed by the Supreme Court at every subsequent opportunity it has had to discuss the doctrine.[2]

2/ See United States v. Colgate Co., 250 U.S. 300 (1919); United States v. Schrader's & Son, 252 U.S. 85 (1920); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); United States v. Line Material Co., 333 U.S. 287 (1948); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Parke-Davis & Co., 362 U.S. 29 (1960); Simpson v. Union Oil Co., 347 U.S. 13 (1964); California Liquor Dealers v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Rice v. Norman Williams Co., 458 U.S. 654 (1982); Monsanto v. Spray-Rite Service Corp., 465 U.S. 752 (1984); 324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987).

Congress, too, has been a proponent of the per se rule. In 1975, Congress enacted the Consumer Goods Pricing Act, repealing two federal statutes which had authorized states to experiment with "Fair Trade Laws". On signing the bill into law, President Gerald Ford announced that the legislation "will make it illegal for manufacturers to fix the prices of consumer products sold by retailers. This new legislation will repeal laws . . . which amended the federal antitrust laws so states could authorize otherwise illegal agreements between manufacturers and retailers setting the price at which a product would be sold to consumers."[3]

Despite judicial and Congressional endorsement of the per se rule, administration antitrust officials early on adopted a policy "to ignore, or to distinguish, the per se prohibition against resale price maintenance." H. Rep. 99-399, Judiciary Committee Report to Accompany H. Res. 303, Vertical Restraints Guidelines Resolution. Antitrust officials' conduct has been roundly criticized over the past six years by Congress. For example, the Department of Justice's Appropriations Bill for Fiscal Year 1984 (H.R. 3222) contained a restriction on further activities by the Justice Department to undermine the per se rule. As a result, the then Assistant Attorney General for

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3/ Public Papers of President Gerald R. Ford, Volume 11, No. 50, at p. 1368 (Statement of President on signing H.R. 6971, December 12, 1975).

Antitrust, William F. Baxter, was compelled to refrain from presenting an oral argument to the Supreme Court, urging reversal of the per se rule in the Monsanto case.

Again, in 1985, Congress sent antitrust enforcement officials a message: Enforce the per se rule against resale price maintenance. In the Conference Report on the Appropriations bill, H.R. 5712, P.L. 98-411, Congress inserted language that affirmed the per se rule and obligated the Antitrust Division not to seek to alter or to limit the existing rule unless and until the Supreme Court authorized such a substantive change. This prohibition remains in place today, as it was part of the 1987 Department of Justice appropriations legislation. In the Senate, strong bipartisan support, led by Senators Rudman and Metzenbaum, assured the public that the per se rule would remain intact.

However, despite language in the 1985 Appropriations legislation, the Justice Department in January, 1985, issued Vertical Restraints Guidelines, ostensibly dealing only with non-price restraints, but which raised questions about the Department's intentions to alter or limit the per se prohibition against resale price maintenance. In addition, the Guidelines promoted dubious propositions of law in the area of non-price vertical restraints. The issuance of the Vertical Restraints

Guidelines again prompted Congress to enter the fray by introduction of H. Res. 303, stating that the Vertical Restraints Guidelines of the Department of Justice "do not have the force of law, do not adequately state current antitrust law, and shall not be considered by the courts of the United States as binding or persuasive." That resolution passed the House with overwhelming bipartisan support, support demonstrated not only by Chairman Rodino's introductory comments, but by Rep. Fish's eloquent recitation of the history of the per se rule and Congressional support for vigorous prosecution of antitrust cases involving resale price maintenance. 131 Cong. Rec. H. 11390-11393 (Daily Ed. December 9, 1985).

This recent Congressional condemnation of resale price maintenance provides a sound basis for passage of S. 430 -- the current bill flows naturally from this past history and is in keeping with Congressional endorsement of the per se rule.

(2) Purpose of Per Se Rule

The per se rule is designed to prevent resale price fixing. During 1975 Congressional hearings on the repeal of "Fair Trade" legislation, Congress cited the costs of resale price fixing:

(1) resale price fixing substantially raises the prices to consumers;

(2) resale price fixing contributes to inflation;

(3) resale price fixing impedes the development of efficient forms of retailing;

(4) resale price fixing causes unnecessary expenditures on advertising and frills associated with sales;

(5) resale price fixing adds to retail business failure; and

(6) resale price fixing facilitates horizontal price fixing.[4]

Because of these serious costs, the per se rule is appropriate. However, the per se rule is meaningless without the ability to enforce it. A per se rule prohibiting resale price maintenance, in the abstract, provides little comfort to a consumer, denied the right to shop for competitive prices, or to a discount retailer, terminated by a manufacturer for discounting activity. The terminated retailer -- for itself and for the consuming public -- must have the ability to invoke the per se rule in litigation. The retailer must have the opportunity to prove that the elimination of discounting, in contravention of the per se rule, was pursuant to an illegal conspiracy. Indeed, if the retailer is not permitted to argue legitimate cases to the jury, then the per se rule, for all of its desirability, is irrelevant. In short, this principle of law is hollow absent the means to enforce it. It is this proposition -- clarifying the

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4/ S.Rep. No. 94-466, 94th Cong., 1st Sess. 1975); H.R. Rep. No. 94-341, 94th Cong., 1st Sess. (1975).

proof needed to make out an antitrust conspiracy -- which S. 430 addresses.

(3) Enforcement of the Per Se Rule By Private Parties Is Essential

The sad fact is that neither the Department of Justice nor the Federal Trade Commission is the least bit interested in pursuing resale price maintenance cases. Indeed, both the Justice Department and Federal Trade Commission believe that private suits are more appropriate. As an example, in a July 9, 1985 letter from the Chairman of the FTC to the Honorable Mark O. Hatfield, Chairman of the Committee on Appropriations for the United States Senate, the FTC stated:

> We believe that blatant resale price maintenance is rare because the per se rule and the prospect of trebled damages is [sic] a deterrent . . . when resale price maintenance is believed to exist, private actions are most appropriate because of the ease of detection and the generous remedies afforded by the antitrust laws.

As a result of the government's abdication of enforcement responsibility, private parties bear, almost exclusively, the burden of ferreting out resale price maintenance conspiracies. Private parties, of course, do not have at their disposal the investigative tools of the government. They must rely upon discovery methods sanctioned by the Federal Rules of Civil Procedure. Private antitrust litigation is, as this Committee well knows, an expensive and time consuming effort. It

is an effort that many injured victims of resale price maintenance will not undertake given the present difficulty of getting a case before a jury.

That is, because of the extraordinarily difficult standard of proof mandated by the Supreme Court in the Monsanto case, a plaintiff alleging resale price maintenance and seeking only to get the facts before the jury bears the threshold burden not only of proving a conspiracy, but also of disproving the existence of any hypothetical innocent explanations for the manufacturer's conduct. The plaintiff in such cases is now expected not simply to present facts which could support an inference of a conspiracy, but to convince the judge that the conspiracy was the sole reason for the manufacturer's conduct in terminating a discounter or in denying the discounter a continued supply of product. The Monsanto opinion, in short, deprives the jury of its rightful place as the ultimate finder of disputed facts and substitutes a rule of law that is far too harsh -- a rule that, in effect denies the right to a jury trial. Because private plaintiffs are the only guardians of the public interest in this area of antitrust law, the effect of the Monsanto opinion, then, is to severely undercut any inquiry into unlawful resale price maintenance activities.

3. The Monsanto Evidentiary Rules Are Too Harsh

The Supreme Court delivered its opinion in the Monsanto case in March 1984. Prior to that time, many lower courts believed that an antitrust plaintiff could survive a Motion for a Directed Verdict if it showed that a manufacturer terminated a price cutting distributor "in response to" complaints by other distributors. This was the rule in the Seventh Circuit. (Monsanto v. Spray-Rite Service Corp., 684 F.2d 1226 (7th Cir. 1983)). This was the rule in the Fourth Circuit. (Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1207, 1213-1215 (4th Cir. 1983)). And this was the rule followed by certain judges in the Eighth Circuit. (Battle v. Lubrizol Corp., 673 F.2d 984, 990-992 (8th Cir. 1982), affirmed by an equally divided en banc court, Battle v. Watson, 712 F.2d 1238 (8th Cir. 1983)(en banc)).

Monsanto changed that law and ruled that an antitrust conspiracy, or agreement to fix prices, could not be inferred "merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints . . ." Under Monsanto, "something more" is needed: "There must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently."

When the opinion was first released, there was some question as to its long lasting impact on resale price maintenance litigation. After all, in that case the Supreme Court did affirm a judgment in favor of the terminated distributor, a decision based upon direct evidence of an agreement to maintain prices. However, lower courts have now demonstrated that the Monsanto in fact has raised the burden of proof on antitrust plaintiffs.

Since Monsanto, summary judgment is being invoked more frequently in dealer termination cases involving alleged resale price maintenance conspiracies. For example, in Gillette Tire Jobbers of Lousiana, Inc. v. Appliance Industries, Inc., 596 F. Supp. 1277 (E.D.La. 1984), a federal district court granted summary judgment and dismissed plaintiff's complaint alleging a Sherman Act violation. Although the plaintiff submitted evidence of dealer complaints and evidence that the manufacturer informed plaintiff that its pricing had created an "upheaval" in the marketplace, the court invoked Monsanto and stated that the evidence was insufficient to go to the jury. The fact that the manufacturer told the complaining dealers that it would "handle the problem" was deemed to be "ambiguous" and inadmissible as hearsay testimony.

Similarly, in Burlington Coat Factory Warehouse Corp. v. Esprit de Corp., 597 F. Supp. 1199 (S.D.N.Y. 1984), aff'd, 769 F.2d 919 (2nd Cir. 1985), the court dismissed a resale price maintenance claim, again citing Monsanto. There, the plaintiff, a discount retailer, had alleged that its supplier refused to deal with the discount retailer because a competitor retailer, a department store, had publicly announced a threat not to deal with suppliers who sold to discounters. Further, the department store invited competing retailers to join in this boycott. The court ruled that this circumstantial evidence was insufficient to establish a conspiracy and that there must be further, direct evidence which would exclude the possibility of independent activity.

In Link v. Mercedes Benz of America Inc., 788 F.2d 918 (3d Cir. 1986), the court required plaintiffs in an RPM case to conclusively exclude the possibility that Mercedes dealers were acting independently in order to prevail on their summary judgment motion. In Garment District, Inc. v. Belk Stores, 799 F.2d 905 (4th Cir. 1986) a full price retailer with 200 stores asked Jantzen to stop selling clothes to a discounter. The retailer threatened to stop selling Jantzen clothing. Jantzen terminated the discounter. The Fourth Circuit ruled that a competitor's complaints about prices, and termination in response to those complaints, were insufficient to permit an inference of

an agreement to fix prices. Jantzen was thought to have an "independent" reason for its conduct -- the loss of the full price retailer's business.

Yet another example is Moffatt v. Lane Co., Inc., 595 F. Supp. 43 (D.Mass. 1984). In that case, the Court granted defendant's Motion for Summary Judgment against plaintiff, a retail seller of furniture who had obtained defendant's products from authorized dealers who transshipped the product. Defendant refused to deal directly with plaintiff and took steps to curtail transshipment to plaintiff. There was evidence that the defendant, following receipt of dealer complaints, announced a policy forbidding its dealers from selling to the plaintiff. The court, citing Monsanto, found no conspiracy, as it construed the competing dealers' communications as "inquiries" and not "complaints."

Most recently, the United States District Court for the Northern District of Illinois granted summary judgment in a dealer termination case by following Monsanto's language. Despite evidence of several competitors' complaints (including a request that the manufacturer "clean up this marketplace"), the Court dismissed the case because the plaintiff did not also exclude the possibility that the manufacturer and the complaining

dealers acted independently. Magid Manufacturing Co. v. U.S.D. Corp., 654 F. Supp. 325 (N.D. Ill. 1987).[5]

Monsanto has thus imposed unfair and onerous burdens on a terminated retailer which seeks to prove a resale price maintenance conspiracy, even when there is evidence of dealer complaints and manufacturer's action in response to those complaints. S. 430 will correct this problem. Under S. 430, evidence of dealer complaints "regarding price competition" and termination, or refusal to supply, "in response to" those complaints will be sufficient to raise an inference of price fixing. It will then be incumbent on a defendant to rebut that inference. Such an allocation of the burden of proof, and the burden of going forward, is fair. It permits the jury to perform its assigned task -- determining the real reason for termination.

S. 430 is important for another reason as well. Many courts, ostensibly relying on Monsanto, have carved away the

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5/ See also Landmark Development Corp. v. Chambers Corp., 752 F.2d 369 (9th Cir. 1985). In that case, the court, having reviewed evidence that the plaintiff lied to the supplier concerning a product's ultimate destination, concluded that there was a legitimate business reason for the manufacturer's refusal to deal with the plaintiff. Given that proof, the court imposed upon plaintiff a burden "of advancing additional specific evidence of such [a price maintenance] conspiracy." Citing Monsanto, the court ruled that complaints followed by termination did not prove a conspiracy. The court construed evidence of contacts between a manufacturer and another distributor as "too highly ambiguous to justify an inference of an agreement to fix prices."

definition of "price fixing." Indeed, many courts now hold that a competing retailer can complain about another retailer's discount prices and can force the manufacturer to terminate the discounter without fear of the antitrust consequences. These courts seem to be saying that a conspiracy to terminate a discounter is not a resale price maintenance conspiracy if the complaining retailer and the manufacturer had not agreed upon a particular, specific resale price.

Before Monsanto, a long line of cases, most notably Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3rd Cir. 1979), held that "if a manufacturer deliberately withdraws its product from a price-cutting distributor at the request of a competing distributor as part of a conspiracy to protect the requesting distributor from price competition, the manufacturer has committed a per se violation of the antitrust laws." Zidell Explorations, Inc. v. Conval Int'l, Ltd., 719 F.2d 1465, 1469 (9th Cir. 1983). This line of cases is jeopardized by the Monsanto ruling, as many recent lower court decisions have construed Monsanto as repudiating the Cernuto-Zidell holding.

For example, in Business Electronics Corp. v. Sharp Electronics Corp., 780 F.2d 1212 (5th Cir. 1986), pet. for cert. filed (No. 85-1910 May 21, 1986), the court reversed a jury verdict in favor of a terminated discounter and observed that the

mere fact that "a manufacturer terminates a price-cutter following or in response to dealer complaints does not determine whether the manufacturer is acting independently, pursuant to a non-price agreement or pursuant to a price agreement." Further, the court stated that "in order for a manufacturer's termination of a distributor to be illegal per se, it must be pursuant to a price maintenance agreement with another distributor." The court's logic is that an agreement to terminate a price-cutter "does not fix prices at any specific or general level but merely frees the complaining dealer to set prices as he chooses." The court relied upon Monsanto as authority for rejecting the Cernuto rule. See also National Marine Electronic Distributors, Inc. v. Raytheon Co., 778 F.2d 190 (4th Cir. 1985) (Directed verdict entered in favor of defendant where there was no specific evidence of a price-fixing agreement but only evidence of termination of a discounter). Over six months ago, the Supreme Court asked the Department of Justice for its views on the Sharp opinion -- and no brief has been filed yet.

Monsanto has prompted many federal district courts to erect impassible hurdles for a plaintiff. For example, in Curry v. Steve's Franchise Co., 1985-2 Trade Cas. (CCH) ¶66,877 (D.Mass. 1985), a franchisor paid a visit to a franchisee who had raised prices over the franchisor's objections. The franchisor physically changed the prices posted by the non-complying

retailer. The franchisee finally gave in to the franchisor's admonitions and changed its prices. The court granted summary judgment for the defendant, concluding that the franchisor had engaged only in lawful "persuasion" and not in unlawful "coercion."

In Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp., 627 F.Supp. 1202 (S.D.N.Y. 1986), the court granted summary judgment for defendant, despite the fact that Volkswagen threatened its dealers with harsh action if they discounted and in fact decreased the allotment of cars to a discounter until its prices were raised. Despite the fact that the discounter, by its conduct, agreed to raise prices, the court ruled that there was no "agreement" but only unilateral action.

These are but a handful of resale price maintenance cases since Monsanto. NMRI submits that the trend is ominous: Discount retailers are being terminated, or forced into compromised positions, at an alarming rate. S. 430, by declaring it illegal to agree "to charge or maintain a price level, including a minimum or maximum price" will address the problems caused by Sharp and Raytheon. The bill will permit the finding of an illegal resale price maintenance scheme even where precise prices have not been set. The bill will restore the Cernuto line of cases to its rightful place in antitrust jurisprudence.

In short, S. 430 is necessary to restore some balance to the relationship between manufacturers and retailers. In appropriate cases, S. 430 will free courts from their Monsanto-imposed role as factfinders and permit deserving cases to go to the jury. It is the jury's province to determine if there was in fact a resale price maintenance conspiracy.

4. S. 430 Will Not Permit Or Encourage the Prosecution of Frivolous Suits

S. 430 is the result of careful analysis. It does no more then restore the law on conspiracy to the rules applied by many courts prior to Monsanto. It permits a terminated retailer to argue its case to the jury when it has uncovered evidence of dealer complaints and termination, or adverse action, "in response to" those complaints. The legislation does not mandate that the jury rule for the plaintiff. The legislation does not prevent a manufacturer from arguing alternative explanations for the termination. The legislation does not embrace a pure chronological test of dealer termination (i.e., termination "following" complaints), but, instead, requires some causation between the complaints and the termination -- hence the "response to" language. The legislation does not alter the Colgate rule which permits a manufacturer to make distribution decisions unilaterally.

The legislation, in short, simply restores equilibrium to antitrust laws. It gives a terminated retailer a fair chance -- but not a loaded gun -- in prosecuting dealer termination cases under a resale price maintenance theory.

NMRI respectfully submits that, because S. 430 will benefit consumers by discouraging unlawful resale price maintenance activities, it should be enacted.

Respectfully submitted,

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Senator METZENBAUM. Thank you.

Our next witness will be Mr. Joe Sims, of Jones, Day, Reavis & Pogue, on behalf of the Antitrust Section of the American Bar Association.

Mr. Sims, we are happy to welcome you. Are you of the Cleveland part of that firm or the Washington firm?

Mr. SIMS. I am in the Washington office, sir. Thank you for the opportunity to present the views of the section. We have submitted a longer statement and I assume that will be included in the record.

Senator METZENBAUM. All of your statements will be fully included in the record.

Mr. SIMS. Thank you. I will try to be brief in summarizing the views of the section. They are set forth in the testimony but I will try to highlight them here today.

We believe that this legislation will not fix a real problem because we are not at all certain there is a real problem, but it might well create some real problems because of the evidentiary standard that is contained in the legislation.

The bill is based at least in part on the premise that lower courts are misapplying traditional conspiracy standards in antitrust. We see no evidence that there is any broad misapplication of traditional conspiracy standards in lower court decisions, nor do we believe that the conspiracy standard which is articulated in the Monsanto decision itself is any different from or incompatible with traditional conspiracy standards in both the horizontal and vertical context under the Sherman Act.

Obviously, different facts in different courts at different times before different Judges with different lawyers produce different results. Not all of those results may be right by whatever standard people would care to apply to them, or even by the standard of what the Supreme Court might decide in any particular case.

But this is not a state of affairs that is confined to RPM circumstances. This is the normal state of affairs in a Judicial system such as ours and is not, we submit, sufficient basis for congressional action.

Indeed, if the Congress chose to act on every issue in which there was some disagreement among the various courts of the country, it would be rather busy in dealing with that legislation.

The legal standard set forth in Monsanto and reaffirmed by the Supreme Court subsequent to that in the *Zenith-Matsushita* case is, we believe, the correct and traditional antitrust conspiracy standard. Boiled down, it says nothing more than that conduct equally susceptible to two interpretations, one of which would lead to a conclusion of illegality and one of which would lead to a conclusion of legality, is not enough to support a jury finding of illegality and thus not enough to present to a jury for such a determination.

That is, we submit, the traditional antitrust conspiracy standard, has been the traditional antitrust conspiracy standard for decades, and is no different in this area than it is in any other antitrust conspiracy area.

There is also, we submit, even more reason to be careful about the standard that is applied in the vertical area, including the RPM area, since an overly harsh standard there has the potential

to discourage competitive, desirable activity. There is less risk of that kind of spillover in the horizontal area, but even in the horizontal area conspiracy standards are applied very gingerly to circumstantial evidence. We believe that this is particularly appropriate in the vertical area.

Thus, we doubt that there is a real problem to be solved, but we are concerned that the legislation, if passed, would itself create real problems. The practical effect of this legislation, we fear, would be to shift the burden of proof in many RPM cases, certainly in those cases in which there was a "communication," whatever that was ultimately determined to be, from the plaintiff to the defendant. This would be a dramatic change which could have dramatic practical implications in these cases.

The statute would create a different evidentiary inference applicable in civil cases than that applicable in criminal cases. This would also be a departure for antitrust and one which bears with it, we believe, the seeds of great difficulty if it were applied in other antitrust areas.

Finally, we fear that the legislation, if passed, might well result in the practical insulation of ineffective distributors and create severe limitations on the manufacturer's application of its independent right to unilaterally decide how to distribute its product, a right which has been recognized by the Supreme Court without serious debate and discussion since 1919.

Thus, we conclude that the legislation would likely cause more problems than it would cure and, for this reason, we strongly oppose the legislation.

We want to thank you again for the opportunity to appear.

[The prepared statement of Mr. Sims follows:]

The views presented herein are being presented only on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the ABA.

REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW CONCERNING THE RETAIL COMPETITION ENFORCEMENT ACT OF 1987

I. INTRODUCTION

This report presents the views of the American Bar Association Section of Antitrust Law concerning two nearly identical bills, S. 430 and H.R. 585. The proposed legislation would amend the Sherman Act by establishing evidentiary standards applicable in civil cases involving resale price maintenance conspiracy claims. Specifically, under both bills the termination of a customer [1/] in response to a competing customer's price complaints would be sufficient in and of itself to raise an inference of a vertical price-fixing conspiracy. This legislation would have the effect of overturning the Supreme Court's decision in Monsanto Corp. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), which held that such evidence is not sufficient to establish a Sherman Act conspiracy.

II. RECOMMENDATION

The Section of Antitrust Law opposes enactment of the proposed amendments to the Sherman Act embodied in S. 430 and H.R 585. The Section believes that the evidentiary standard established by the Supreme Court in Monsanto is fully consistent with long-standing Sherman Act law, and is sound as a matter of antitrust procedure and policy. The legislation would create an unsound evidentiary presumption which would allow an antitrust conspiracy to be inferred from ambiguous evidence. In addition, the proposed legislation would harm consumers by chilling legitimate

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1/ As used herein, the term "customer" refers to dealers, distributors and all other buyers for resale.

cooperation between manufacturers and their individual customers and by discouraging manufacturers from pursuing improvements in their marketing strategies.

III. S. 430 AND H.R. 585

The Senate and House bills are virtually identical. Each bill has two operative provisions. The first provision establishes an evidentiary standard applicable to resale price maintenance claims, while the second confirms that vertical price-fixing agreements remain per se illegal.

S. 430 provides that

> [i]n any civil action based on section 1 or 3 of [the Sherman Act], including an action brought under section 5 of the Federal Trade Commission Act, which alleges a contract, combination of conspiracy to set, change, or maintain a price level, evidence that a person who sells a good or service to the claimant for resale --
>
> (1) received from a competitor of the claimant, a communication regarding price competition by the claimant in the resale of such good or service, and
>
> (2) in response to such communication terminated the claimant as a buyer of such good or service for resale, or refused to supply to the claimant some or all of such goods or services requested by the claimant,
>
> shall be sufficient to raise the inference that such person and such competitor engaged in concerted action to set, change, or maintain a price level, for such good or service in violation of such section. 2/

Both bills further provide that in any civil action brought under Section 1 or 3 of the Sherman Act alleging an agreement to fix prices, the fact that a seller and a

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2/ The House bill differs from the Senate bill only in its inclusion, after each reference to "price level," of the phrase "including a minimum or maximum price."

purchaser entered into an agreement as to the resale price of a good or service "shall be sufficient to establish" a violation of that section. 3/

IV. MONSANTO CO. v. SPRAY-RITE SERVICE CORP.

In Monsanto the issue addressed by the Court was the quantum of evidence required to raise a jury issue when a customer alleges that it was terminated by a manufacturer pursuant to a vertical agreement to maintain resale prices. The Court held that a jury should not be permitted to infer an agreement merely from the existence of complaints by competing customers about the plaintiff's price-cutting, or even from the fact that the termination was "in response to" such complaints, because such evidence without more, does not indicate concerted action. 465 U.S. at 763-64. The Court stated that although evidence of complaints has some probative value, "the burden remains on the antitrust plaintiff to introduce additional evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy." Id. at 764 n.8.

According to the Court, in order for an issue for the fact-finder in a customer termination case to be created,

> something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. . . .[T]he antitrust plaintiff should present direct or circumstantial evidence that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."

Id. at 764 (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981)).

3/ Since vertical price fixing is currently illegal per se, this portion of the proposed legislation would merely codify existing case law. This Report does not address this portion of the legislation, nor is anything in this Report intended to express any views on this issue. This Report assumes that resale price maintenace is per se illegal and deals only with the evidentiary standards required to establish the existence of a resale price maintenance agreement.

The Court noted that permitting a finding of concerted action premised solely upon evidence of competitor complaints would seriously undermine the manufacturer's right to establish unilaterally the terms and conditions under which it will sell its merchandise and to terminate those customers who act inconsistently with its marketing goals and strategies. That right has been a basic and virtually unchallenged tenet of vertical restraints law at least since United States v. Colgate & Co., 250 U.S. 300 (1919). Implicit in the Colgate doctrine is the recognition that a manufacturer's freedom to decide independently how its products will reach the ultimate consumer is an important element of interbrand competition at the manufacturer level. Although there may be competitive risks when a manufacturer agrees with others about how its products will be distributed, no such risks attend the manufacturer's unilateral distributional choices. Thus, Colgate reflects an appropriate reconciliation between manufacturer freedom and the requirements of the Sherman Act.

In Monsanto, the Court expressly sought to preserve the Colgate doctrine by recognizing that competitor complaints may operate as an important mechanism through which a manufacturer learns of problems in its distribution network. The Court pointed out that

> complaints about price cutters "are natural -- and from the manufacturer's perspective, unavoidable -- reactions by distributors to the activities of their rivals." Such complaints, particularly where the manufacturer has imposed a costly set of nonprice restrictions, "arise in the normal course of business and do not indicate illegal concerted action." . . .Moreover, distributors are an important source of information for manufacturers. In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently. To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market.

Id. at 763-64 (citations omitted).

V. BASES FOR COMMITTEE'S RECOMMENDATION

A. The Proposed Amendments Would Create A Counterfactual Evidentiary Presumption

The most objectionable feature of the proposed legislation is that it would establish a new conspiracy standard applicable to a small subset of antitrust cases. In his statement introducing S. 430, Senator Metzenbaum states that there has been "considerable confusion" with respect to the evidentiary standard to be applied in customer termination cases since Monsanto and that "[s]ome lower courts' interpretations of what evidence a plaintiff must present under Monsanto run counter to traditional conspiracy law and result in the dismissal of cases that should be presented to a jury." To the extent that these statements purport to reflect the true purposes of the proposed legislation, these bills rest on two erroneous premises.

First, there has been no widespread confusion since Monsanto. The case stands for the simple proposition that competitor complaints, without more, do not provide a sufficient basis for inferring unlawful concerted activity. The proposed legislation does not attack lower courts' interpretations of Monsanto; it attacks the fundamental holding of the Monsanto decision itself. Second, Monsanto did not alter the law of conspiracy as it relates to resale price maintenance cases. The Court merely applied the traditional principle of conspiracy law that, because the termination of a customer after receiving price complaints is as consistent with permissible independent action as with an illegal conspiracy, a conspiracy should not be inferred from competitor complaint evidence standing alone. Thus, it is the proposed legislation, and not the Monsanto decision, that creates a special conspiracy standard applicable to customer termination cases.

The term conspiracy has been traditionally understood to mean "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946). The courts have recognized that trade conspiracies seldom can be proven with direct

evidence, and they have permitted antitrust plaintiffs broad latitude to establish concerted action through circumstantial evidence. Where a conspiracy is to be inferred from circumstantial evidence, however, the courts have required plaintiffs to come forward with evidence sufficient to establish that the alleged conspirators have not acted independently.

Thus, in Matsushita Elect. Inds. Co. v. Zenith Radio Corp, ___ U.S. ___, 106 S.Ct. 1348 (1986), the Supreme Court declined to find a conspiracy where defendants had no rational economic motive to conspire, and their conduct was consistent with equally plausible, non-conspiratorial explanations. See also Transource International, Inc. v. Trinity Industries, Inc., 725 F.2d 274 (5th Cir. 1984); Reborn Enterprises, Inc. v. Fine Child, Inc., 590 F. Supp. (S.D.N.Y. 1984), aff'd per curiam, 754 F.2d 1072 (2d Cir. 1985). Similarly, in Tose v. First Penn. Bank, 648 F.2d 879 (3d Cir.), cert. denied, 454 U.S. 893 (1981), a boycott case, the court found no conspiracy because, although the defendant had an interest in preventing plaintiff from obtaining refinancing, the alleged co-conspirators had independent reasons for denying plaintiff a loan. Where plaintiffs have attempted to establish the existence of a conspiracy by proof of parallel conduct, the courts have uniformly held that such evidence, standing alone, is insufficient. Fine v. Barry & Enright Productions, 731 F.2d 1394 (9th Cir.), cert. denied, __ U.S. __, 105 S.Ct. 248 (1984). The courts have also rejected the view that a conspiracy can be inferred from the existence of competitor meetings, Hanson v. Shell Oil Co., 541 F.2cd 1352 (9th Cir. 1976), cert. denied, 429 U.S. 1974 (1977), or from the fact that competitors have shared certain information, United States v. Citizens & Southern National Bank, 422 U.S. 86 (1975).

The Supreme Court's decision in Monsanto merely placed these well-established rules concerning Sherman Act conspiracies into a resale price maintenance context, where competitor complaints are an ordinary and necessary element of the manufacturer/customer relationship. A manufacturer, for example, may have a strong

interest in ensuring that dealers provide expensive pre-sale and post-sale services. Dealers who provide these services may be unwilling to continue providing them if a discount operator is "free-riding" on their efforts. The mere fact that the manufacturer's interests coincide with the interest of the full service dealer in this situation does not mean that the manufacturer has conspired with the full service dealer in terminating the discounter. The termination, although undertaken following complaints from the full service dealer, would be fully consistent with the manufacturer's individual interest in ensuring that the appropriate level of service is being provided. By permitting an inference of concerted action from ambiguous evidence equally consistent with lawful conduct, the proposed legislation would take resale price maintenance claims outside of mainstream conspiracy law and place them alone in a special category.

There is also a risk that this legislation will not be confined to resale price maintenance. To the extent that these bills purport to "clarify" what constitutes a Sherman Act conspiracy, by permitting an inference of concerted behavior from mere contacts between alleged co-conspirators without proof of a meeting of the minds, there is a danger that the conspiracy requirement in all Sherman Act Section 1 cases will be diluted.

B. The Proposed Amendments Would Discourage Procompetitive Behavior

The evidentiary standard established in Monsanto forces courts to face squarely the delicate task in customer termination cases of distinguishing between independent and concerted conduct. The Court's holding was based, in part, on its recognition that it is both unfair and a departure from traditional conspiracy law to allow treble damage liablity to be based on evidence that is as consistent with permissible conduct as with illegal conspiracy. But the Monsanto rule also has a firm antitrust policy basis: the rule acknowledges that contacts between a manufacturer and its customers are usually beneficial and therefore should not be discouraged. Steps taken by a

manufacturer to improve the effectiveness and efficiency of its distribution system, such as the establishment of exclusive territories or adoption of a policy of selling only to full service distributors or dealers, often require extensive contacts between the manufacturer and its customers. A manufacturer typically receives a stream of comments, advice, and criticism from its customers about its marketing approach. For example, a manufacturer may learn from its distributors that free-riding problems are discouraging them from providing repair service and marketing support within their local areas of operation. See Computer Place, Inc. v. Hewlett-Packard Company, 607 F. Supp. 822, 830 (N.D. Cal. 1984), aff'd mem., 779 F.2d 56 (9th Cir. 1985) (manufacturer stopped selling to plaintiff, a mail-order retailer, after local dealers complained about free-riding by mail-order dealers).

Often the flow of information from a customer to a manufacturer contains comments -- and even complaints -- about price competition from other customers. There is no justification, however, for assuming that all such exchanges, and any actions taken by a manufacturer in response, stem from a resale price maintenance motive. Judge Posner illustrates the fallacy of that assumption with the following example:

> The violation of a lawful restriction on distribution, such as a reasonable customer allocation agreement, will manifest itself to the dealer who complies with the restriction as price cutting, for it is only by price cutting or some equivalent concession that a new dealer can take away the established dealer's customers. As long as the supplier's motive is not to keep his established dealers' prices up but only to maintain his system of lawful nonprice restrictions, he can terminate noncomplying dealers without fear of antitrust liability even if he learns about the violation from dealers whose principal or perhaps only concern is with protecting their prices.

Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1440 (7th Cir. 1986).

The proposed legislation potentially would harm consumers by deterring manufacturers from investing in marketing strategies that might enhance interbrand competition and increase output. The risk that a comment by a customer, at most ambiguous, could lead to antitrust liability could cause a manufacturer to forego

marketing efforts requiring close support and participation from customers. Moreover, the proposed amendments would artificially support customers who are failing to perform repairs, failing to advertise, failing to maintain adequate display facilities and otherwise hampering effective distribution of products. The receipt of a single, unsolicited complaint about pricing would prevent a manufacturer from acting in its independent self-interest to terminate such customers. Indeed, a single complaint -- even if contrived by the dealer -- would tend to, as a practical matter, insulate the dealer complained about against termination, whatever policies the dealer adopts in contravention of the manufacturer's stated distributional policies.

The selection of an evidentiary standard for customer termination cases is, thus, more than a procedural matter; the choice has important substantive consequences.

In adopting the evidentiary standard announced in Monsanto, the Supreme court recognized that impermissible manufacturer conduct with respect to resale prices is often difficult to distinguish from legitimate, procompetitive behavior. Citing Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the Court noted that even restraints that have impact upon resale prices may foster interbrand competition. The Monsanto evidentiary standard thus reflects an effort to confine resale price maintenance liability to the situation that poses the greatest risk to consumers: actual agreements between manufacturers or customers to maintain prices at predetermined levels. A rule that would permit liability where the evidence of an agreement is ambiguous would prevent manufacturers from terminating customers even where their intent in doing so is to enhance competition. Given the uncertainty concerning the situations under which resale price maintenance harms competition, it would be unwise to lower the standard of proof in this area, while preserving a higher standard with respect to horizontal price-fixing and boycotts where the anticompetitive nature of the conduct is undisputed.

C. The Proposed Amendments Would Unnecessarily Abrogate The Judge's Function

According to the statements of its sponsor, one purpose of the proposed legislation is to correct a perceived failure to give due weight to customer complaints in the context of motions for summary judgment and directed verdict. There is no indication, however, that the lower courts have, since Monsanto, usurped the jury's role. Indeed, in Monsanto itself, the Court found an unlawful agreement based upon customer complaints in combination with other evidence. Rather, courts have examined evidence of customer complaints in the context in which they occurred in order to determine whether the complaints could support an inference of conspiracy. See, e.g., Business Electronics Corp. v. Sharp Electronics Corp., 780 F.2d 1212, 1219 (5th Cir. 1986) (agreement could be inferred from circumstantial evidence, which included vehemence of complaints, manufacturers' efforts to convince plaintiff to adhere to suggested prices, evidence that complaining customer usually followed manufacturer's suggested prices and encouraged plaintiff to do likewise, and evidence that plaintiff was not free-riding); Marco Holding Co. v. Lear Siegler, Inc., 606 F. Supp. 204, 209-10 (N.D. Ill. 1985) (material issue of fact on conspiracy issue raised by complaints about plaintiff's deviation from manufacturer's price schedule, timing of complaints and termination, vehemence of complaints, and competing customers' threats to stop buying from manufacturer)

The proposed amendments are legislative summary judgment rules. This is an unwarranted abrogation of the federal judge's role. In post-Monsanto cases, complaints have not been ignored; they have been treated as relevant evidence on the conspiracy issue. A rule that requires a judge automatically to send such evidence to the jury would be an unwise departure from the normal practice whereby the judge considers the evidence as a whole, not in rigid compartments, before determining whether it is sufficient to go to the jury.

D. The Legislation Is Imprecise And Would Spawn Wasteful Litigation

Both bills suffer from ambiguities, resolution of which would waste the resources of litigants and the courts. The new evidentiary standard would apply whenever a complaint has been "received from" a competing customer. To whom must the customer complain in order for the complaint to be deemed "received" by the manufacturer? If a customer makes an unsolicited comment about a competing customer's prices to a local sales representative, or to the employee who drives the delivery truck, is management precluded thereafter from terminating the competitor without risking antitrust liability?

The phrase "communication regarding price competition" is hopelessly vague. It is broad enough to include nearly every business conversation between a manufacturer and its customer. It is natural and unavoidable for customers to discuss their performance with reference to what their competitors are doing. The topic of "price competition" can come up in countless legitimate contexts, but the proposed legislation's elastic phrasing invests all mentions of price competition with conspiratorial significance.

E. Conclusion

For the reasons expressed above, The Section of Antitrust Law opposes the proposed amendents to the Sherman Act.

RESOLUTION OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW CONCERNING THE "RETAIL COMPETITION ENFORCEMENT ACT OF 1987" AND THE "FREEDOM FROM VERTICAL PRICE FIXING ACT OF 1987"

WHEREAS, the above-named bills have been proposed for consideration and enactment by the United States Senate and House of Representative during the 100th Congress; and

WHEREAS, this proposed legislation would amend the federal antitrust laws by permitting the inference of a contract, combination or conspiracy to set, change or maintain a price level from evidence of competitor complaints followed by termination of the complained of customer; and

WHEREAS, the proposed legislation would create an exception to the ordinary and traditional evidentiary standard applied to conspiratory allegations under Section 1 of the Sherman Act; and

WHEREAS, the proposed legislation would harm consumers by discouraging procompetitive activity by persons who sell goods and services for resale by others;

BE IT RESOLVED, THEREFORE, that the Section of Antitrust Law expresses its opposition to the proposed legislation.

BE IT FURTHER RESOLVED, that this resolution, together with the Report of the Section of Antitrust Law, be distributed to any House or Senate committee that shall consider the above-named legislation during the 100th Congress.

Senator METZENBAUM. Thank you very much, Mr. Sims.

Mr. Milstein, we will hear from you now.

Mr. MILSTEIN. Mr. Chairman and members of the committee, I am Monroe Milstein, Chairman of the Board of the Burlington Coat Factory Warehouse. I ask that my written testimony be placed in the record of this proceeding.

Senator METZENBAUM. I have already made such a ruling.

Mr. MILSTEIN. Thank you. I take this opportunity to express my deep appreciation to Senator Metzenbaum, Senator Rudman, Senator Bradley, and Senator Simon for championing our cause and the cause of the people and small businessmen, especially you, Mr. Chairman, for recognizing the need to help counterbalance the lack of Federal enforcement and the strange ideas that are seeping into the courts.

I am not an attorney, but I would like to explain to the committee my observations of the marketplace before 1980 and the bizarre competitive behavior after 1980 has had a harmful effect on consumers, retailers like myself and manufacturers also.

Of the thousands of manufacturers that Burlington does business with, the majority of them want to continue doing business with Burlington and they are appalled by the fact that the interpretation of the law has changed where they can be pressured now by full-price retailers into stop selling to people who sell for less.

My wife and I purchased the Burlington Coat Factory in 1972 with our life savings. We had a garment factory and an outlet store. In 1975, at about the same time that Congress repealed the famous fair trade laws, we started to expand our business. Today, we have 91 stores in 31 States. It is due to the tremendous response from consumers throughout the country. Of course, we give prime first quality merchandise in season to the public at savings of 25 to 50 percent.

Since 1980, a signal has gone out, fostered by the then head of the FTC and the then head of the Antitrust Division of the Justice Department, and they said we do not think that price fixing is bad for the consumer.

If you ask a thousand consumers, do you want to have the right to buy for less, 999 out of 1,000 would say yes, and the one who said no probably did not hear the question right.

Kiplinger sent out letters and different trade associations have sent out letters that the law as it is on the books is not being carried out any more, you can do what you want. Just this year, a buying office representing hundreds of stores sent out a letter, which is included in my written testimony, saying that you can now complain about prices, you do not have to worry any more, and any manufacturer who tells you he is not allowed to stop selling somebody because of prices, it is not true.

The law now is not enforced, because the heads of those departments want to bring back price fixing. The head of the Justice Department at that time, Baxter, made a statement that he did not care if the business of the United States was conducted by 100 corporations.

Competition is what drives prices down and if you eliminate competition you have higher prices. We see a continuing trend in this country of larger and larger conglomerates controlling the major

retailers, such as May Department Stores buying Associated Dry Goods. Although Burlington has grown and been able to withstand some of the pressures, our legal costs have been tremendous, and we are still small compared to $10 and $20 billion conglomerates. There is now another trend. The major full-price stores are being bought out by shopping center owners, real estate people. They will control the prices of the merchandise, they will not allow people to open up stores in their centers if they undersell the stores that they own.

There is more concentration of power that is going to destroy small businessmen like myself. This is a very important piece of legislation before you because it is the last bastion for the small businessman. Many small businessmen have been forced out of business.

Yes, sir, did you wish to ask me a question?

Senator METZENBAUM. No, the time has run out.

Mr. MILSTEIN. I am sorry. I am sorry I got emotional about this. It is a very emotional issue. It is one of the most important pieces of legislation because without it the free enterprise system will be eroded, the competitive process eroded, and the consumer gets it in the neck when these things happen.

Thank you, sir.

[The prepared statement of Mr. Milstein follows:]

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INTRODUCTION

Mr. Chairman, Members of the Committee, I am Monroe G. Milstein, President of the Burlington Coat Factory Warehouse Corporation, headquartered in Burlington, New Jersey. Burlington Coat Factory is an apparel retailer which consistently sells name-brand merchandise at prices well below those charged by traditional department and specialty stores.

The company is a member of the National Mass Retailing Institute which represents most of the nation's price-competitive general merchandise retail industry.

Our business was begun by my father, Abe, as a coat wholesaler in 1924. This enterprise led us into retailing in 1972, the year we bought the old abandoned Modecraft Factory Outlet on Route 130 in Burlington, New Jersey. We re-opened the company as Burlington Coat Factory Warehouse and was our first retail location there.

I have been Chairman of the Board, President and a Director of the Burlington Coat from its inception in 1972. Prior to 1972, I was President of Monroe G. Milstein, Inc., a wholesaler of outerwear located in New York and now a wholly-owned subsidiary of the Burlington Coat Factory Warehouse.

I come before you today to voice our whole-hearted support for S. 430, the Metzenbaum, Rudman, Simon, Bradley, et al measure, "The Retail Competition Enforcement Act of 1987", a bill which has strong bipartisan support. If passed, the measure is likely to deter one of most common forms of price-fixing in our industry.

Twice before, I have testified before this committee to voice

MY GRAVE CONCERN REGARDING VARIOUS ATTEMPTS BY GOVERNMENT OFFICIALS TO WEAKEN THE ANTITRUST LAWS AND EXPOSE OUR INDUSTRY TO THE EVER INCREASING THREAT OF ANTICOMPETITIVE PRACTICES WHICH CAUSE PRICE-FIXING. THESE ACTIVITIES WERE BOTH ANTI-CONSUMER AND ANTI-BUSINESS.

I AM PLEASED TO BE HERE TO SUPPORT A BILL WHICH IS A LEGISLATIVE EFFORT TO STRENGTHEN, RATHER THAN WEAKEN, ANTITRUST ENFORCEMENT. I BELIEVE THAT THIS MEASURE REPRESENTS A POSITIVE STEP TOWARD PRESERVING THE ORIGINAL INTENT OF ANTITRUST LAWS. UNTIL RECENTLY, WE HAD A FAIRLY CLEAR IDEA OF WHAT CONSTITUTED LEGITIMATE BUSINESS PRACTICES AND ILLEGAL ANTI-COMPETITIVE PRACTICES.

DURING MY EARLY YEARS IN RETAILING, I FELT THAT IT WAS UNNECESSARY TO BE A BRILLIANT ATTORNEY TO DETERMINE WHAT TYPE OF BUSINESS BEHAVIOR WAS ACCEPTABLE OR NOT ACCEPTABLE. TODAY, EVEN MY ATTORNEYS CANNOT DEFINITIVELY TELL ME WHAT MARKET-PLACE ACTIVITIES ARE LEGAL OR ILLEGAL.

DURING THOSE FIRST FIFTY-SIX YEARS OF MY FAMILY'S BEING IN BUSINESS, PRICE-FIXING WAS INVARIABLY CONSIDERED TO BE ILLEGAL CONDUCT. HOWEVER, DURING THE LAST SIX YEARS ANTITRUST ENFORCEMENT OFFICIALS HAVE THROWN THE MARKETPLACE INTO CHAOS WITH UNPROVEN AND IMPRACTICAL ECONOMIC THEORIES, WHICH HAVE DEPICTED SOME FORMS OF PRICE-FIXING AS INNOCUOUS. AS A RESULT, A CLOUD HANGS OVER NOT ONLY MY INDUSTRY AND MANUFACTURERS BUT OVER THE CONSUMER AS WELL. MANUFACTURERS, RETAILERS, CONSUMERS, THE JUDICIARY, CONGRESSMEN, LAWYERS AND ECONOMISTS BELIEVED THAT OUR ANTITRUST LAWS PROHIBITED EVERY FORM OF PRICE-FIXING. THE LEGISLATIVE HISTORY OF THE SHERMAN ACT EVIDENCES A CONGRESSIONAL INTENT TO LET THE ENTIRE MARKETPLACE, FREE OF PRIVATE RESTRAINTS, DETERMINE THE PROPER ALLOCATION OF RESOURCES. HOWEVER, THE OFFICIALS CHARGED WITH THE DUTY TO ENFORCE OUR FEDERAL ANTITRUST LAWS HAVE ACTIVELY ARGUED IN THE PRESS, BEFORE CONGRESS AND TO THE COURTS THAT CERTAIN ANTITRUST LAWS WHICH PROHIBIT PRICE-FIXING SHOULD BE EITHER CHANGED OR NOT BE ENFORCED.

THESE OFFICIALS HAVE EXPOSED OUR INDUSTRY AND THE CONSUMER TO POLICIES BASED ON AN ANTITRUST PHILOSOPHY BY WHICH NOT ONLY MANUFACTURERS ARE GIVEN FREER REIN TO CONTROL EVERY STEP OF THE DISTRIBUTION PROCESS, BUT FULL PRICE RETAILERS ARE ALMOST ENCOURAGED TO CONDUCT ANTICOMPETITIVE PRACTICES. SINCE OUR INDUSTRY'S SUCCESS HAS RESULTED FROM OUR ABILITY TO OFFER THE CONSUMER FIRST QUALITY MERCHANDISE AT LOW PRICES, WE ARE JUSTIFIABLY CONCERNED BY ANY SUCH ATTEMPT TO UNDERMINE THE STRICT PROHIBITION AGAINST PRICE-FIXING.

IT IS INTERESTING TO NOTE THAT FOLLOWING THE REPEAL OF THE SO-CALLED "FAIR TRADE" LAWS IN 1975, WHICH YOU, MR. CHAIRMAN, RECOGNIZED AS BEING VERY IMPORTANT TO THE WELFARE OF CONSUMERS, MY COMPANY HAS GROWN FROM ONE RETAIL OUTLET TO A PRESENT TOTAL OF 91 STORES THROUGHOUT THE NATION. SUCH GROWTH WOULD HAVE BEEN IMPOSSIBLE IF THE OLD LAWS WHICH PERMITTED RESALE PRICE MAINTENANCE HAD NOT BEEN ABROGATED BY CONGRESS. TODAY, HOWEVER, OUT CONTINUED GROWTH AND VIABILITY ARE THREATENED ON SEVERAL FRONTS.

THE JUSTICE DEPARTMENT'S ECONOMIC THEORY AND ACTIONS

THERE IS A NEED TO RETRACE BRIEFLY SOME HISTORICAL EVENTS AND ISSUES OF THE PAST DECADE. FROM 1975 TO 1980, AFTER THE REPEAL OF "FAIR TRADE" LAWS, BURLINGTON COAT FACTORY SELDOM EXPERIENCED ATTEMPTS AT PRICE-FIXING. WE BELIEVE THIS WAS DUE TO BOTH THE ENFORCEMENT POLICIES OF FEDERAL OFFICIALS AND THE FINANCIAL IMPLICATIONS OF TREBLE DAMAGES IN PRIVATE LITIGATION. THIS FAVORABLE CLIMATE CHANGED DRASTICALLY AFTER 1980.

IN THE EARLY 1980'S, FORMER ASSISTANT ATTORNEY GENERAL BAXTER AND FORMER FTC CHAIRMAN MILLER INITIATED AN ASSAULT ON THE ANTITRUST LAWS, INCLUDING THE PROHIBITION AGAINST RESALE PRICE MAINTENANCE (RPM). I UNDERSTAND THAT THEY VIEWED RPM AS BENEFICIAL, SUPPOSEDLY BECAUSE RPM CORRECTS MARKET FAILURE AND ENABLES THE CONSUMER TO RECEIVE COMPLEX TECHNOLOGICAL PRODUCTS

AND/OR PRODUCTS THAT REQUIRE RELATIVELY LARGE AMOUNTS OF POINT-OF-SALE SERVICE. UNDER THIS THEORY, IT WAS ARGUED, RPM MIGHT PROMOTE ENTRY INTO SOME LINES OF BUSINESS, THUS, POTENTIALLY INCREASING COMPETITION. IT IS A MYSTERY TO ME WHY SUCH MATTERS RELATING TO HIGH TECHNOLOGY FIELDS SHOULD APPLY ACROSS THE BOARD IN INDUSTRIES SUCH AS APPAREL, WHERE NO HIGH TECHNOLOGICAL SERVICES ARE NEEDED.

FURTHERMORE, THEY HAVE CONTENDED THAT ATTEMPTS TO INSTITUTE RPM WHERE IT IS NOT COMPETITIVELY BENEFICIAL WILL BE CORRECTED BY THE MARKETPLACE. THUS, THEY SAY, GOVERNMENT POLICING OF RPM AGREEMENTS UNDER THE PER SE RULE IS UNNECESSARY.

HARM OF RPM

THIS ECONOMIC THEORY CONTRASTS SHARPLY WITH THE VIEW TAKEN BY CONGRESS....WITH THE BENEFIT OF CAREFUL STUDY OF ACTUAL MARKETPLACE CONDITIONS....WHEN CONGRESS REPEALED THE "FAIR TRADE" LAWS AND MADE RPM A PER SE VIOLATION IN ALL CASES. MOST MEMBERS OF CONGRESS HAVE TENDED TO AGREE WITH INDUSTRY EXPERTS THAT, IN FACT, RPM:

A. DENIES TO CONSUMERS THE ABILITY TO CHOOSE THE LEVEL OF SERVICE THEY WANT;

B. IS AN UMBRELLA THAT PROTECTS INEFFICIENT PRODUCERS;

C. FACILITATES AGREED UPON PRICING BY MANUFACTURERS;

D. SERVES ONLY TO INCREASE PRICES TO CONSUMERS.

E. DETERS NEW COMPETITION BY DEPRIVING PROSPECTIVE ENTRANTS INTO THE MARKET OF A PRINCIPAL COMPETITIVE TOOL, PRICE CUTTING.

SENATOR THURMOND SPEAKS OUT

ONE UNITED STATES' SENATOR WHO SPOKE ON THIS ISSUE AND CLEARLY RECOGNIZED THE IMPORTANCE OF ELIMINATING PRICE-FIXING BECAUSE OF IT BEING IN THE BEST INTEREST OF THE COUNTRY WAS SENATOR THURMOND. THE FOLLOWING IS HIS STATEMENT.

ADDITIONAL VIEWS OF SENATOR STROM THURMOND (R-SC) ON H.R. 6971, A BILL TO REPEAL ENABLING LEGISLATION FOR FAIR TRADE LAWS

THE QUESTION SHOULD BE RAISED AS TO WHETHER IT IS DESIRABLE TO PASS FEDERAL LEGISLATION TO REPEAL EXISTING FAIR TRADE LAWS. UNDER THE MILLER-TYDINGS ACT AND McGUIRE ACT, THE RESPECTIVE STATES ARE NOT REQUIRED TO ENACT FAIR TRADE LAWS AND NONSIGNER PROVISIONS, BUT ARE MERELY GIVEN THE OPPORTUNITY TO DO SO IF THEY WISH. CONGRESS HAS PERMITTED THE STATES TO ENACT FAIR TRADE LAWS SINCE 1937, ALMOST FORTY YEARS AGO, AND REINFORCED THAT RIGHT IN 1952.

I FIRMLY BELIEVE IN THE FULFILLMENT OF THE SPIRIT, AS WELL AS THE LETTER, OF THE CONSTITUTION OF THE UNITED STATES REGARDING THE TENTH AMENDMENT'S PRESERVATION OF THE POWERS AND THE RIGHTS OF THE STATES AND THE PEOPLE. SOME YEARS AGO, I STRONGLY OPPOSED THE EFFORT ON THE FEDERAL LEVEL TO IMPOSE A NATIONAL FAIR TRADE LAW UPON THIS COUNTRY. I REMAIN CONCERNED THAT THE SEPARATE STATES BE ALLOWED TO MAKE DECISIONS REGARDING FAIR TRADE LAWS TO THE GREATEST EXTENT POSSIBLE.

IN VIEW OF MY RESPECT FOR THE INTEGRITY OF THE INDIVIDUAL STATES, I HAVE GIVEN CAREFUL THOUGHT TO WHETHER THE FEDERAL GOVERNMENT SHOULD SUPPLANT THE JUDGMENT OF THE STATES IN THIS AREA. IN CONSIDERING THIS MATTER, I HAVE BEEN AWARE THE STATES HAVE NOT BEEN

COMPLETELY INSENSITIVE TO THE NEED TO MAKE CHANGES IN THIS AREA AS SHOWN BY THE FACT THAT A NUMBER OF STATES IN RECENT YEARS HAVE MOVED TO REPEAL THEIR FAIR TRADE LAWS.

AFTER CAREFUL THOUGHT AND ANALYSIS, I CONCLUDE THAT I WILL NOT DISSENT FROM THE DECISION OF THIS COMMITTEE TO FAVORABLY REPORT H.R. 6971. A REVIEW OF THE RECORD INDICATES REPEAL OF THE FAIR TRADE LAWS IN THE VARIOUS STATES SHOULD BE IN THE BEST INTEREST OF THE COUNTRY. LOWER PRICES SHOULD BE AVAILABLE TO CONSUMERS, AND A SUBSTANTIAL CONTRIBUTION SHOULD BE MADE IN THE EFFORT TO CONTROL INFLATION.

ON BALANCE, IT APPEARS THE POSITIVE BENEFITS PRODUCED BY THIS LEGISLATION SHOULD OUTWEIGH ANY NEGATIVE EFFECTS IT WOULD HAVE. I HAVE CONCLUDED THAT IT IS LESS OBJECTIONABLE TO ENACT LEGISLATION DISALLOWING FAIR TRADE LAWS THAN IT IS FOR THE CONGRESS TO CONTINUE TO SANCTION PRICE FIXING THAT RESULTS FROM THE EXISTENCE OF FAIR TRADE LAWS.

HOWEVER, DURING THIS ADMINISTRATION, THE JUSTICE DEPARTMENT AND THE FTC EMBARKED ON A BLATANT POLICY OF NON-ENFORCEMENT AND ATTEMPTED TO CHANGE THE EXISTING ANTITRUST LAWS FORBIDDING PRICE-FIXING. CONGRESS FOUND IT NECESSARY TO RESTRICT THE JUSTICE DEPARTMENT'S APPROPRIATIONS SO THAT IT WOULD NOT TRY TO CHANGE THE EXISTING PER SE RULE ON RPM AS JUSTICE ATTEMPTED IN THE MONSANTO CASE.

PREVIOUS CONGRESSIONAL ACTION

UNFORTUNATELY, THE APPROPRIATIONS RESTRICTION DID NOT DETER THE ANTITRUST DIVISION FROM COMING FORWARD WITH THE MUCH CRITICIZED "VERTICAL RESTRAINTS GUIDELINES". THE JUSTICE

DEPARTMENT'S GUIDELINES PROVIDED A NOVEL, BUT VERY DANGEROUS INTERPRETATION TO THE ANTITRUST LAWS CONCERNING PRICE-FIXING. CONGRESS AND THE STATE ATTORNEYS GENERAL WERE OUTRAGED AND, IN A BIPARTISAN EFFORT, CONGRESS REINSTATED THE APPROPRIATIONS RESTRICTIONS AND CALLED FOR THE JUSTICE DEPARTMENT TO WITHDRAW "VERTICAL RESTRAINTS GUIDELINES". IT IS OUR UNDERSTANDING THAT IN SPITE OF THE CALL FOR WITHDRAWAL, REPRESENTATIVE FISH, IN A SPEECH TO A TRADE GROUP, NOTED THAT SEVERAL JUDICIAL OPINIONS HAD RELIED UPON THE DISCREDITED GUIDELINES.

WE BUSINESSMEN ARE STARTLED THAT THE JUSTICE DEPARTMENT WOULD DENOUNCE THE PER SE RULE WHICH THE EMPIRICAL DATA, AS PRESENTED TO CONGRESS IN 1975, SUBSTANTIATED THAT:

A. CONSUMERS PAID 10% TO 27% HIGHER PRICES IN STATES THAT ALLOWED PRICE-FIXING THAN IN STATES THAT EXCLUDED PRICE-FIXING;

B. MORE BUSINESSES FAILED IN STATES THAT ALLOWED PRICE-FIXING VERSUS THOSE STATES THAT EXCLUDED PRICE-FIXING;

C. FEWER NEW BUSINESSES ENTERED THE MARKETPLACE IN STATES THAT ALLOWED PRICE-FIXING THAN IN STATES THAT EXCLUDED PRICE-FIXING.

UNABLE TO REBUT SUCH HARD, STATISTICAL EVIDENCE, REPRESENTATIVES OF THE ADMINISTRATION HAVE IGNORED THE FACTS IN FAVOR OF UNSUBSTANTIATED ECONOMIC THEORIES WHICH FIND NO SUPPORT IN EMPIRICAL DATA. QUITE SIMPLY, THESE ECONOMIC THEORIES ARE BASED ON HOW THE ADMINISTRATION WOULD LIKE THE MARKET TO BEHAVE RATHER THAN ON THE REALITIES OF THE MARKET ITSELF.

WE STRONGLY BELIEVE IN THE RIGHTS OF THE CONSUMER. WE BELIEVE THAT IT IS IMPORTANT FOR YOU TO UNDERSTAND OUR INDUSTRY AND WHY WE HAVE DECIDED IT IS IMPERATIVE TO OPPOSE THE WEAKENING OF THE ANTITRUST LAWS PROHIBITING RPM.

A PERSPECTIVE ON THE RETAILING INDUSTRY

RETAILING IS A DIVERSE, DYNAMIC, CONSTANTLY CHANGING AND DEVELOPING INDUSTRY. IT RESPONDS AND ADAPTS TO CHANGES IN THE ECONOMY, IN TECHNOLOGY AND IN SOCIETY. DEPARTMENT STORES, SPECIALTY STORES, VARIETY STORES, DISCOUNT STORES, CATALOG STORES, OFF-PRICE STORES -- ALL REPRESENT INNOVATIONS IN MERCHANDISING THAT AROSE TO MEET CONSUMER DEMAND AND TO OFFER THEIR OWN SPECIAL COMBINATION OF COMPETITIVE ADVANTAGES, AMONG THEM PRICE, SELECTION, LOCATION, HOURS, CONVENIENCE AND AVAILABILITY OF CREDIT.

OUR INDUSTRY BELIEVES THAT CONTINUED EFFORTS BY THE JUSTICE DEPARTMENT AND THE FTC TO UNDERMINE THE PROHIBITION AGAINST RPM HAVE EXPOSED PRICE COMPETITIVE RETAILERS, LARGE AND SMALL ALIKE, TO INCREASING ANTICOMPETITIVE PRESSURE.

THE KEYSTONE MARKUP

TO APPRECIATE THE IMPORTANCE OF THE PROPOSED LEGISLATION, IT IS NECESSARY TO UNDERSTAND A FEW SIMPLE REALITIES OF THE MARKET-PLACE. TRADITIONALLY, DEPARTMENT AND SPECIALTY STORES HAVE CHARGED THE SO-CALLED "KEYSTONE" MARKUP WHEN RETAILING APPAREL. KEYSTONING CONSISTS OF, QUITE SIMPLY, CHARGING THE CONSUMER AT LEASE TWICE THE COST OF THE MERCHANDISE. RETAILERS SUCH AS BURLINGTON HAVE ACHIEVED SUCCESS BY OFFERING FULL LINES OF IN-SEASON, BRANDED MERCHANDISE AT PRICES CONSIDERABLY BELOW THE KEYSTONE MARKUP. AT BURLINGTON, WE FOLLOW THE PRACTICE OF OFFERING THE MERCHANDISE AT 25 PERCENT BELOW THE TRADITIONAL MARKUP, WHICH I ADD, IS GENERALLY THE MANUFACTURER'S SUGGESTED RETAIL PRICE. WE HAVE BEEN ABLE TO ACHIEVE PROFITABLE OPERATIONS AT THIS MARKUP BECAUSE WE ARE MORE EFFICIENT OR COST EFFECTIVE THAN FULL-PRICE RETAILERS.

NEEDLESS TO SAY, OUR ABILITY TO PROFITABLY SELL MERCHANDISE AT SUCH LOW PRICES TO THE CONSUMER HAS NOT BEEN WELCOMED BY OUR

FULL-PRICE COMPETITORS AND SOME CLOTHING MANUFACTURERS. TO FULLY APPRECIATE THE NEED FOR THE PENDING LEGISLATION, IT IS NECESSARY TO CLEAR UP ONE MISCONCEPTION WHICH MANY HAVE EXPRESSED WHEN TALKING ABOUT RPM. MANY PERSONS, ESPECIALLY THOSE WHO ARGUE IN FAVOR OF DOING AWAY WITH THE RPM PROHIBITION, ALMOST INVARIABLY DISCUSS RESALE PRICE-FIXING IN THE CONTEXT OF A MANUFACTURER ATTEMPTING TO FIX THE RESALE PRICES OF ITS MERCHANDISE. CLEARLY, THERE ARE MANY MANUFACTURERS WHO NOW OR IN THE PAST HAVE ATTEMPTED TO DO THIS.

ATTEMPTS TO ELIMINATE PRICE COMPETITION

HOWEVER, IN OUR EXPERIENCE, MOST EFFORTS TO ELIMINATE PRICE COMPETITION ORIGINATE NOT WITH THE MANUFACTURER BUT WITH THE FULL-PRICE RETAILERS WHO WOULD PREFER NOT TO COMPETE WITH BURLINGTON'S LOW RESALE PRICES. IT STANDS TO REASON THAT A RETAILER WHO, FOR GENERATIONS, HAS COMFORTABLY CHARGED KEYSTONE WILL BE LESS THAN PLEASED WHEN CONFRONTED WITH A RETAILER WHO OFFERS THE SAME MERCHANDISE FOR 25 PERCENT LESS. TO MEET SUCH COMPETITION, I UNDERSTAND THE ANTITRUST LAWS TO ENCOURAGE THE FULL-PRICE RETAILER TO BECOME MORE EFFICIENT AND THUS TO PRICE ITS GOODS COMPETITIVELY. UNFORTUNATELY, MANY ENTRENCHED, FULL-PRICED RETAILERS HAVE DETERMINED TO INTERFERE WITH THE OFF-PRICE MERCHANT'S SOURCE OF SUPPLY, RATHER THAN TO MEET SUCH COMPETITION FAIRLY.

IN OUR EXPERIENCE, THE SINGLE GREATEST THREAT TO PRICE COMPETITION IN THE APPAREL INDUSTRY IS THE PRESSURE BROUGHT BY FULL-PRICE RETAILERS ON MANUFACTURERS TO CURTAIL BUSINESS WITH VALUE-ORIENTED RETAILERS. ALTHOUGH SOME MANUFACTURERS ATTEMPT TO MAINTAIN THE RETAIL PRICES OF THEIR MERCHANDISE, IN OUR EXPERIENCE, THE OVERWHELMING MAJORITY ARE ONLY TOO HAPPY TO SELL TO OUR INDUSTRY BECAUSE WE PAY THE FULL, WHOLESALE PRICE ON TIME, WE MOVE OUR MERCHANDISE FASTER AND, THUS, ENHANCE THE MANUFACTURER'S PROFIT. WE HAVE HAD MANY EXCELLENT RELATIONSHIPS

WITH MANUFACTURERS WHICH HAVE LASTED FOR YEARS AND WERE ONLY JEOPARDIZED AFTER THE MANUFACTURER HAD BEEN PRESSURED OR THREATENED BY A FULL-PRICE RETAILER EITHER TO CEASE DOING BUSINESS WITH BURLINGTON OR TO RISK THE LOSS OF ALL SALES TO THE DEPARTMENT STORE CHAIN. IF A DEPARTMENT STORE CHAIN IS POWERFUL ENOUGH, THE MANUFACTURER WILL, HOWEVER RELUCTANTLY, GIVE IN TO SUCH PRESSURE OR THREATS AND TERMINATE ITS BUSINESS WITH OFF-PRICE MERCHANTS.

THE RESULT IS ALMOST SELF-EVIDENT: OFF-PRICE MERCHANTS ARE ELIMINATED IN A GIVEN TRADE AREA WITH THE RESULT THAT THE ONLY PLACE THE CONSUMER CAN GO TO BUY THE PRODUCT IS AT A DEPARTMENT OR SPECIALTY STORE WHICH CHARGES THE KEYSTONE MARKUP. THEREFORE, WHERE SALES TO A VALUE-ORIENTED RETAILER ARE CUT OFF AT THE BEHEST OF A FULL-PRICE RETAILER, THE ELIMINATION OF PRICE COMPETITION IS OBVIOUS.

FORMS OF VERTICAL PRICE FIXING

IN ORDER FOR THE COMMITTEE TO APPRECIATE THE VARIOUS FORMS WHICH SUCH ANTICOMPETITVE ACTIVITIES TAKE, I WILL CITE A FEW INSTANCES IN WHICH BURLINGTON COAT FACTORY HAS BEEN A TARGET OF PRESSURE. ON SEVERAL OCCASIONS, ECONOMICALLY POWERFUL FULL PRICE RETAILERS IN THE MID-WEST ATTEMPTED TO PRESSURE A WOMEN'S SPORTWEAR SUPPLIER NOT TO SELL TO BURLINGTON COAT FACTORY AT SEVERAL MIDWESTERN LOCATIONS. TO AVOID JEOPARDIZING THE ACCOUNT, BURLINGTON COAT FACTORY REMOVED THE MANUFACTURER'S GOODS FROM THE STORES IN QUESTION.

MORE DAMAGING TO BURLINGTON WAS A SITUATION IN THE SOUTH WHERE A HUGE FULL PRICE CHAIN PERSUADED A MEN'S WEAR MANUFACTURER TO CUT OFF BURLINGTON COAT FACTORY IN ITS TRADE AREA. THE MANUFACTURER NOT ONLY CUT OFF BURLINGTON COAT FACTORY IN THE SOUTH, IT TERMINATED SALES TO ALL OF BURLINGTON'S LOCATIONS. IN ANOTHER INSTANCE, AN ACTIVE WEAR MANUFACTURER TOLD BURLINGTON THAT, BECAUSE OF PRESSURE FROM DEPARTMENT STORES, IT WANTED BURLINGTON TO RAISE ITS RETAIL PRICES. TO AVOID LOSING THE LINE

-- WHICH WAS TOTALLY IRREPLACEABLE -- BURLINGTON RELUCTANTLY AGREED TO CHARGE KEYSTONE (OR 100% MARKUP). WHEN BURLINGTON PRICED BELOW KEYSTONE, THE MANUFACTURER TERMINATED SALES.

BURLINGTON'S ATTORNEYS HAVE ADVISED ME THAT, UNTIL RECENTLY, THERE WAS NO DISPUTE AMONG LAWYERS OR MEMBERS OF THE FEDERAL JUDICIARY CONCERNING THE BASIC PROPOSITION THAT ANY COERCED ACTIVITY WHICH HAS AN ADVERSE EFFECT ON PRICE COMPETITION IS A PER SE VIOLATION OF THE ANTITRUST LAWS. HOWEVER, I UNDERSTAND THAT THIS WELL-SETTLED PRINCIPLE HAS BEEN THROWN INTO GRAVE DOUBT BY INTERPRETATIONS OF THE MONSANTO DECISION. I AM ADVISED THAT, IN NUMEROUS CASES, THE COURTS HAVE INTERPRETED MONSANTO TO PLACE AN IMPOSSIBLE BURDEN OF PROOF UPON THE PLAINTIFF WHO HAS ATTEMPTED TO RECOVER DAMAGES UNDER THE ANTITRUST LAWS OWING TO THE COERCED TERMINATION OF SALES OF A LINE OF MERCHANDISE AT THE BEHEST OF A POWERFUL FULL-PRICE RETAILER. EVEN WHERE IT IS ABUNDANTLY CLEAR THAT THE MANUFACTURER HAS TERMINATED A RETAILER IN RESPONSE TO THE PRESSURE, COERCION OR THREATS OF A POWERFUL DEPARTMENT STORE CHAIN, THE COURTS HAVE GRANTED SUMMARY JUDGMENT OR DIRECTED VERDICTS TO THE DEFENDANTS AT A RATE WHICH IS BECOMING THE RULE RATHER THAN THE EXCEPTION.

POST MONSANTO CASES AND THEIR RESULTS ON THE MARKETPLACE

I AM AWARE OF SEVERAL PARTICULARLY EGREGIOUS CASES WHICH VIVIDLY ILLUSTRATE THE NEED FOR THE PROPOSED LEGISLATION.

IN THE GARMENT DISTRICT V. BELK CASE, THE COURT FOUND THAT THE ONLY REASON THE PLAINTIFF DISCOUNTER WAS TERMINATED WAS THAT THE MANUFACTURER WAS ECONOMICALLY COERCED TO EFFECTUATE THE CUT-OFF BY THE THREATS OF A GIANT DEPARTMENT STORE CHAIN. THE DEPARTMENT STORE'S THREAT CONSISTED OF THE FLAT STATEMENT THAT, IF SALES TO THE PLAINTIFF CONTINUED, THE MANUFACTURER WOULD LOSE ALL BUSINESS WITH THE DEPARTMENT STORE CHAIN. IN ADDITION, THE MANUFACTURER'S DECISION TO TERMINATE THE DISCOUNTER WAS SET FORTH IN A LETTER TO THE FULL-PRICE RETAILER WHICH THE DEFENDANTS ADMITTEDLY ATTEMPTED TO DESTROY.

NOTWITHSTANDING THIS GROSS EXAMPLE OF COMPETITIVE PRESSURE GOING FAR BEYOND THE MERE COMPLAINTS IN MONSANTO AND THE PRESENCE IN THE RECORD OF A "SMOKING GUN" DOCUMENT RECITING THE CONSPIRACY, THE COURT RULED THAT, UNDER MONSANTO, IT MUST ENTER A DIRECTED VERDICT FOR THE DEFENDANT. THE PLAINTIFF IN THAT CASE WENT BANKRUPT AND WAS DEPRIVED OF ANY REMEDY AT LAW.

I ALSO REFER TO THE SHARP CASE, IN WHICH THE EVIDENCE WAS CLEAR THAT A DISTRIBUTOR WAS CUT OFF IN RESPONSE TO PRESSURE BY A FULL-PRICE RETAILER BUT THE JURY VERDICT WAS OVERTURNED BECAUSE, IN THE APPELLATE COURT'S OPINION, NO PRICES WERE FIXED BECAUSE NO ONE SAT DOWN AND AGREED UPON SPECIFIC PRICES. OBVIOUSLY, WHERE TWO PARTIES AGREE TO ELIMINATE A DISCOUNTER, PRICE COMPETITION WILL BE ADVERSELY AFFECTED AND THERE IS NO NEED TO AGREE WITH RESPECT TO SPECIFIC PRICES.

ANOTHER POST-MONSANTO CASE WHICH IS APPALLING TO VALUE-ORIENTED RETAILERS AND THE CONSUMERS WHO PATRONIZE THEM IS THE MCCABE INC. V. LA-Z-BOY CASE. THERE, TOO A DISCOUNTER HAD BEEN TERMINATED AS A DIRECT RESULT OF COMPETITIVE PRESSURE BY A FULL-PRICE RETAILER. THE COURT WENT SO FAR AS TO FIND THAT A CONSPIRACY HAD EXISTED BUT TO REVERSE A JUDGMENT FOR PLAINTIFF BECAUSE, ALTHOUGH DEFENDANT REPEATEDLY COMPLAINED ABOUT PRICE, IT ALSO COMPLAINED ABOUT THE COMPETITOR'S IMAGE AND THE MANUFACTURER CLAIMED THAT ITS CONCERN WAS PRIMARILY WITH IMAGE. THE COURT FOUND THAT PLAINTIFF HAD PRESENTED INSUFFICIENT EVIDENCE TO PROVE THAT THE COMSPIRACY WAS PRICE-NOTIVATED.

THIS IS TRULY AN ASTONISHING RESULT. UNDER THIS CASE, ANTITRUST LIABILITY CAN BE ESCAPED IF THE FULL-PRICE RETAILER SIMPLY PRESSURES THE MANUFACTURER ON MORE THAN ONE GROUND TO EFFECTUATE THE THE CUT-OFF. THE FULL-PRICE RETAILER EVADES THE PER SE RULE IF HE COMPLAINS ABOUT PRICES AND ANYTHING ELSE HE CAN THINK ABOUT. IF THIS BECOMES THE LAW OF THE LAND, ANY FULL-PRICE RETAILER WHO WISHES TO AFFECT THE ELIMINATION OF PRICE COMPETITION WOULD NEED ONLY CALL THE MANUFACTURER TO COMPLAIN

ABOUT PRICE COMPETITION AND SOME OTHER ASPECT OF THE COMPETITOR'S BUSINESS SUCH AS THE APPEARANCE OF ITS STORE, THE MANNER IN WHICH IT PRESENTS MERCHANDISE, THE SUITABILITY OF ITS ADVERTISING, ETC. IF SUIT IS BROUGHT, DEFENDANTS WILL MAINTAIN THAT THE NON-PRICE CONSIDERATION WAS THE MOTIVATING FACTOR AND, THUS, OBTAIN SUMMARY JUDGEMENT. THIS CASE IS A DRAMATIC INDICATION OF THE EXTENT TO WHICH THE FEDERAL JUDICIARY HAS GONE ASTRAY IN ATTEMPTING TO INTERPRET MONSANTO

LETTER PRESSES FOR TERMINATION OF DISCOUNTERS

THE DIRECT IMPACT ON THE MARKETPLACE BY THESE INTERPRETATIONS IS READILY SEEN BY THE ATTACHED LETTER (DATED SEPTEMBER 18, 1986) WHICH WAS SENT BY THE YOUTH FASHION GUILD TO ITS MEMBERS. THE YOUTH FASHION GUILD IS A BUYING CO-OP FOR APPROXIMATELY 200 BUSINESSES WHICH RANGE IN SIZE FROM ONE TO FORTY STORES. AS A BUYING CO-OP, YOUTH FASHION GUILD CAN EXERCISE INFLUENCE ON MANUFACTURERS AND DISTRIBUTORS DUE TO THE ECONOMIC POWER OF ITS MEMBERS IN THE AGGREGATE.

PLEASE NOTE THE SPECIFIC PARAGRAPH WHICH STATES:

"IT WILL BE INTERESTING TO SEE THE OUTCOME OF THIS UNFORTUNATE BATTLE OF THE GIANTS. AS A RESULT OF THE SUPREME COURT RULING ON THE "MONSANTO CASE", WHICH STATED THAT A MANUFACTURER WAS A FREE AGENT AND COULD ARBITRARILY DETERMINE TO WHOM HE WOULD SELL HIS PRODUCT, UNLESS PROOF EXISTED THAT HE WAS COERCED INTO MAKING THAT DECISION BY ANOTHER INTERESTED PARTY, ANY MANUFACTURER CAN NOW CONTROL THE DISTRIBUTION OF HIS OWN PRODUCTS. SO, WHENEVER A SALESMAN OR A MANUFACTURER TELLS YOU THAT HE IS LEGALLY FORCED TO CONTINUE SELLING A DISCOUNTER WHO HAS HAD PREVIOUS ACCESS TO HIS LINE, YOU CAN TELL THEM THAT THEY ARE TALKING THROUGH THEIR HATS - HOWEVER - DO NOT USE THREATS TO FORCE THEM TO DISCONTINUE THE SALE OF THEIR PRODUCT TO ANYONE. IT IS YOUR PRIVILEGE AND RIGHT TO

REFUSE TO BUY ANY LINE THAT IS PEDDLED TO A DISCOUNTER, BUT UNDER NO CIRCUMSTANCES SHOULD YOU SAY "ITS EITHER THEM OR ME!"

OBVIOUSLY, THE LETTER DEMONSTRATES THAT THE MARKETPLACE IS MOVING TOWARDS, AND WILL FURTHER DEVELOP, INTO AN ANTICOMPETITIVE SLUGFEST RATHER THAN THE TRADITIONAL FREE AND OPEN MARKETPLACE WITH INTENSE COMPETITION WHICH HAS BEEN THE CORNERSTONE OF OUR ECONOMIC SYSTEM.

DUE TO RECENT LOWER COURT CASES, AS NOTED IN MY TESTIMONY, THEY CAN NOW SEND THE EXACT SAME LETTER AND TELL THEIR MEMBERS THAT IT IS ALL RIGHT TO SAY "IT'S EITHER THEM OR ME".

IT IS IMPORTANT TO REITERATE THAT MANUFACTURERS ARE BEING ADVERSELY AFFECTED, "...WHENEVER A SALESMAN OR A MANUFACTURER TELLS YOU HE IS LEGALLY FORCED TO CONTINUE SELLING TO DISCOUNTERS WHO HAVE HAD PREVIOUS ACCESS TO HIS LINE, YOU CAN TELL THEM THAT THEY ARE TALKING THROUGH THEIR HAT..." WHATEVER HAPPENED TO THE RIGHT OF A MANUFACTURER TO BE ABLE TO CHOOSE WITH WHOM THEY WANT TO DO BUSINESS?

GENERALLY, MANUFACTURERS ARE INTERESTED IN SELLING THEIR GOODS TO AS MANY RETAILERS AS POSSIBLE. THIS, TOO, IS TRADITIONAL MARKETPLACE BEHAVIOR. HOWEVER, DUE TO LOWER COURT INTERPRETATIONS OF MONSANTO, THE MANUFACTURERS ARE LOSING THEIR RIGHTS GIVEN THE PRESENT CLIMATE IN THE MARKETPLACE. THEY ARE NO LONGER ALWAYS IN A POSITION TO MAKE UNILATERAL BUSINESS DECISIONS AS GUARANTEED UNDER THE "COLGATE DOCTRINE".

THE LEGISLATION ADDRESSES DIFFICULTIES FACING PLAINTIFF

ALL OF THE CASES MENTIONED ABOVE WOULD HAVE BEEN DECIDED DIFFERENTLY IF THE PROPOSED LEGISLATION HAD BEEN IN EFFECT. IT SEEMS TO ME THAT THE PROPOSED LEGISLATION IS SIMPLY A RESTATEMENT OF SEVERAL GENERAL PRINCIPLES OF ANTITRUST LAW WHICH WERE

UNQUESTIONED UNTIL MONSANTO. IN THE FIRST PLACE, IT HAS ALWAYS BEEN THE LAW THAT CONSPIRACIES CAN RESULT FROM ECONOMIC COERCION. THE GARMENT DISTRICT COURT FOUND ECONOMIC COERCION BUT THOUGHT THAT MONSANTO STOOD FOR THE PROPOSITION THAT ECONOMIC COERCION COULD NOT RESULT IN A CONSPIRACY. THIS MISAPPREHENSION WOULD NOT HAVE OCCURRED IF THE PENDING MEASURE HAD BEEN PASSED.

AS I READ IT, IT PERMITS A JURY DETERMINATION AS TO WHETHER A CONSPIRACY EXISTS, WHEREVER A DISCOUNTER IS CUT OFF IN RESPONSE TO COMPLAINTS ABOUT DISCOUNTING. IF COMPLAINTS ABOUT DISCOUNTING COULD LEAD TO A JURY TRIAL, SURELY THE KIND OF ECONOMIC DURESS PRESENT IN THE GARMENT DISTRICT CASE WOULD BE SUFFICIENT TO CREATE A CONSPIRACY.

THE PENDING LEGISLATION WOULD ALSO DISPOSE OF THE ANOMALIES IN THE SHARP AND LA-Z-BOY CASES. CONSISTENT WITH TRADITIONAL ANTITRUST ANALYSIS, A PRICE-FIXING AGREEMENT COULD BE INFERRED UNDER THE PROPOSED MEASURE SIMPLY FROM THE FACT THAT THE COMPLAINTS CONCERN DISCOUNTING AND THAT THE TERMINATION WAS IN RESPONSE TO THE COMPLAINTS. THIS WOULD CHANGE THE RESULT IN A CASE SUCH AS SHARP, WHICH HOLDS THAT PRICES ARE NOT FIXED BY THE ELIMINATION OF A DISCOUNTER UNLESS THE PARTIES ADDITIONALLY SIT DOWN AND AGREE ON SPECIFIC PRICES. LIKEWISE, THE LEGISLATION WOULD DO AWAY WITH THE ERRONEOUS NOTION OF THE LA-Z-BOY COURT THAT ECONOMIC DURESS CONSISTING OF PRICE COMPLAINTS AND NON-PRICE COMPLAINTS CANNOT BE A BASIS FOR INFERRING A PRICE-FIXING CONSPIRACY, SO LONG AS DEFENDANT CLAIMS THAT PRICE WAS NOT DETERMINITIVE OF THE TERMINATION.

I EXPECT THAT LOBBYISTS FOR FULL-PRICE RETAILERS WILL OPPOSE THIS MEASURE BY ARGUING THAT IT WILL RESULT IN NUMEROUS JURY TRIALS OF MERITLESS LITIGATIONS. SUCH AN ARGUMENT CANNOT BE MAINTAINED IN GOOD FAITH. EVEN IF THE MEASURE IS PASSED, THE PLAINTIFF STILL HAS AN EXTRAORDINARILY HEAVY BURDEN OF PROOF. IT MUST PROVE THAT A COMPETITOR COMPLAINED ABOUT ITS PRICES TO THE MANUFACTURER AND THAT THE CUT-OFF WAS IN RESPONSE TO THOSE COMPLAINTS. THE MANUFACTURER REMAINS FREE TO OFFER EVIDENCE THAT

THE COMPLAINTS DID NOT CAUSE THE TERMINATION AND THAT IT OCCURRED FOR SOME OTHER LEGITIMATE REASON SUCH AS THE MANUFACTURER'S CONCERN FOR ITS IMAGE. OUR SYSTEM OF GOVERNMENT ASSUMES THAT A JURY IS COMPETENT TO REVIEW THE EVIDENCE AND DETERMINE THE TRUE MOTIVATION OF A PARTY.

EVEN WITH THE LEGISLATION, IT WILL REMAIN DIFFICULT FOR THE PLAINTIFF TO MAKE OUT A CASE FOR AN ADDITIONAL REASON. IT WOULD BE NAIVE TO ASSUME THAT EITHER THE MANUFACTURER OR THE FULL-PRICE RETAILER WILL ADMIT THAT COMPLAINTS ABOUT PRICING OCCURRED.

IN THE FACE OF AN ANTITRUST SUIT, MANY PERSONS HAVE BEEN KNOWN TO HAVE SELECTIVE MEMORIES, PARTICULARLY ABOUT COMMUNICATIONS WHICH COULD RESULT IN A SUBSTANTIAL JUDGMENT AGAINST THEM. THUS, FOR A PLAINTIFF TO EVEN COMMENCE A CASE, IT MUST HAVE SUBSTANTIAL CIRCUMSTANTIAL OR DIRECT EVIDENCE THAT A COMPLAINT OCCURRED AT ALL, THAT THE COMPLAINT WAS ABOUT PRICING, AND THAT THE TERMINATION WAS IN RESPONSE TO THE COMPLAINT.

THE GARMENT DISTRICT CASE ILLUSTRATES HOW DIFFICULT IT IS TO PROVE THIS SEQUENCE OF EVENTS. THERE, THE MANUFACTURER ACTUALLY REDUCED THE AGREEMENT TO WRITING AND SENT IT TO THE FULL-PRICE RETAILER. UPON RECEIPT, THE FULL-PRICE RETAILER DIRECTED ALL CONCERNED TO DESTROY EVERY COPY OF THE LETTER. THE LETTER WOULD NEVER HAVE SEEN THE LIGHT OF DAY IF A FORMER EMPLOYEE OF THE MANUFACTURER HAD NOT RETAINED A COPY. THUS, ANY CONTENTION THAT PASSAGE OF THIS BILL WILL RESULT IN A FLOOD OF STRIKE SUITS AND MERITLESS LITIGATION MUST BE REJECTED OUT OF HAND.

ANOTHER POST-MONSANTO PROBLEM WHICH THE LEGISLATION WILL ADDRESS IS THE DIFFICULTY WHICH A PLAINTIFF HAS IN OBTAINING HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL IN AN ANTITRUST CASE. AS A NON-LAWYER, I HAD ALWAYS ASSUMED THAT A LITIGANT HAD THE RIGHT TO TRIAL BY JURY. I AM INFORMED THAT, SINCE MONSANTO, MANY COURTS HAVE INTERPRETED MONSANTO IN SUCH A WAY AS TO DO AWAY WITH JURY DETERMINATION IN MOST CASES.

IN THE THREE CASES I HAVE ALREADY DISCUSSED, THE FINAL DECISION WAS MADE BY A JUDGE OR JUDGES RATHER THAN BY A JURY. (IN THE GARMENT DISTRICT, THE COURT GRANTED DIRECTED VERDICTS TO THE DEFENDANTS AND IN LA-Z-BOY AND SHARP, THE COURT OVERRULED JURY DECISIONS.) IN NUMEROUS OTHER CASES, THE COURT HAS ENTERED "SUMMARY JUDGMENT" BEFORE THE TRIAL HAS COMMENCED.

MY ATTORNEYS ADVISE ME THAT IN SOME CASES IT IS APPROPRIATE TO DISMISS AN ACTION WITHOUT TRIAL BY JURY. THESE ARE CASES WHERE THE PLAINTIFF HAS NO EVIDENCE FROM WHICH A REASONABLE JURY COULD FIND IN ITS FAVOR. HOWEVER, CERTAIN LANGUAGE IN MONSANTO HAS BEEN USED TO DEPRIVE THE PLAINTIFF OF A JURY TRIAL, DESPITE THE EXISTENCE OF EVIDENCE WHICH WOULD ORDINARILY BE SUFFICIENT TO PERMIT THE CASE TO GO TO A JURY. NOTABLY, MANY COURTS HAVE SEIZED UPON THE WORDS "AMBIGUOUS EVIDENCE" SET FORTH IN THE MONSANTO CASE.

ISSUE OF AMBIGUOUS EVIDENCE

THE SUPREME COURT IN MONSANTO HAD EXPRESSED DISAPPROVAL OF AWARDING ANTITRUST JUDGMENTS ON THE BASIS OF "AMBIGUOUS EVIDENCE". THUS, WHERE THE PLAINTIFF PRESENTS CIRCUMSTANTIAL EVIDENCE INDICATING THAT A TERMINATION OCCURRED PURSUANT TO A CONSPIRACY AND THE DEFENDANTS HAVE DENIED THAT THE CONSPIRACY OCCURRED, SEVERAL COURTS HAVE GRANTED SUMMARY JUDGMENT OR A DIRECTED VERDICT SIMPLY BECAUSE THEY FOUND THE EVIDENCE TO BE "AMBIGUOUS" WITHIN THEIR INTERPRETATION OF MONSANTO.

SPEAKING AS A LAYMAN, IT IS MY UNDERSTANDING THAT MOST CIRCUMSTANTIAL EVIDENCE IS AMBIGUOUS. I DOUBT VERY MUCH THAT THE SUPREME COURT INTENDED MONSANTO TO RESULT IN THE DISMISSAL OF ALL CASES SIMPLY BECAUSE THE EVIDENCE IS ARGUABLY AMBIGUOUS. IT IS THE TRADITIONAL FUNCTION OF THE JURY TO INTERPRET THE EVIDENCE, EVEN WHERE SOME OF IT IS AMBIGUOUS. I UNDERSTAND THAT THE PROPOSED MEASURE WOULD ENSURE A JURY TRIAL EXCEPT IN THOSE CASES WHERE THE EVIDENCE IS SO AMBIGUOUS THAT NO REASONABLE JURY COULD DECIDE THE CASE IN FAVOR OF PLAINTIFF. I BELIEVE THIS WOULD BE

CONSISTENT WITH THE SUPREME COURT'S TRUE INTENTION IN DELIVERING THE MONSANTO OPINION AND AT THE SAME TIME RESTORE THE JURY TRIAL TO ITS TRADITIONAL FUNCTION.

"FREE RIDER" ARGUMENT

FINALLY, THE PROPOSED AMENDMENT WOULD CLEAR UP SOME MISUNDERSTANDINGS AS TO THE SCOPE OF THE MONSANTO HOLDING. MONSANTO INVOLVED THE DISTRIBUTION OF A SOPHISTICATED HERBICIDE WHICH, TO BE PROPERLY IMPLEMENTED, REQUIRED COMPLICATED AND COSTLY SERVICE PROGRAMS. THE COURT NOTED THAT IN THE HERBICIDE FIELD, THERE WAS THE SO-CALLED "FREE RIDER" PROBLEM WHICH WOULD INEVITABLY LEAD TO INNOCENT COMPLAINTS ABOUT DISCOUNTERS. IT WAS UNDERSTANDABLE, IN THE COURT'S VIEW, THAT MONSANTO'S HERBICIDE DEALERS WHO ABSORBED THE COST OF PROVIDING SOPHISTICATED SERVICES WOULD COMPLAIN ABOUT BEING UNDERSOLD BY DEALERS WHO DID NOT PROVIDE SUCH SERVICES. THIS MAY VERY WELL MAKE SENSE IN HIGH TECHNOLOGY FIELDS, BUT IT HAS NO APPLICATION TO THE GARMENT BUSINESS, WHERE NO COSTLY SERVICES ARE NECESSARY OR REQUIRED BY THE MANUFACTURER. SELF-EVIDENTLY, A PURCHASER OF CLOTHING DOES NOT NEED TRAINING IN HOW TO WEAR IT.

IN FACT, IT SEEMS TO ME THAT THE ENTIRE "FREE RIDER" CONCEPT HAS BEEN MISUNDERSTOOD, EVEN HIGH TECH FIELDS. UNDER THE SYLVANIA CASE, A MANUFACTURER MAY, BY CONTRACT REQUIRE POINT-OF-SALE SERVICE, DISPLAY, ETC. IF A DISTRIBUTOR FAILS TO PROVIDE SUCH SERVICE, A MANUFACTURER HAS ENTIRELY ADEQUATE REMEDIES UNDER THE LAW OF CONTRACT. WHY THE MAINTENANCE OF HIGH RESALE PRICES ARE NEEDED TO EFFECTUATE SUCH DISTRIBUTIONAL PROGRAMS IS A MYSTERY TO ME.

THE NEW MEASURE WOULD NOT ELIMINATE THE "FREE RIDER" ARGUMENT IN CASES INVOLVING INDUSTRIES WHERE THE FREE RIDER IS ACTUALLY A PROBLEM. NOTHING IN THE LEGISLATION PRECLUDES A MANUFACTURER FROM OFFERING EVIDENCE THAT THE TERMINATION WAS MOTIVATED BY AN APPROPRIATE DISTRIBUTIONAL CONCERN -- SUCH AS FREE RIDING. IF A

PLAINTIFF PROCEEDING UNDER THE NEW LAW OFFERS EVIDENCE OF PRICE COMPLAINTS FOLLOWED BY A TERMINATION, THE MANUFACTURER CAN OFFER EVIDENCE THAT THE PLAINTIFF WAS A FREE RIDER AND WAS TERMINATED FOR THAT REASON. IT WILL BE FOR THE JURY TO DETERMINE WHICH VERSION OF THE FACTS IS TRUE. OF COURSE, IN INDUSTRIES SUCH AS THE APPAREL INDUSTRY, WHERE THERE IS NO FREE RIDER PROBLEM, THE MANUFACTURER MAY NEVERTHELESS BE ABLE TO PERSUADE THE JURY THAT IT ACTED PROPERLY ON THE BASIS OF SOME OTHER EXPLANATION FOR THE TERMINATION.

INDEED, IT APPEARS THAT, IF THERE IS A "FREE RIDER" PROBLEM IN THE APPAREL BUSINESS, IT IS CAUSED NOT BY THE DISCOUNTER BUT RATHER BY THE FULL PRICE RETAILERS. FULL PRICE RETAILERS DO NOT CREATE A NAME OR IMAGE FOR A PARTICULAR PRODUCT. THE MANUFACTURER AND DESIGNER INITIALLY MARKET THE PRODUCT TO DEVELOP THE NAME BRAND BEFORE IT IS ASSOCIATED WITH SPECIFIC RETAILERS. FULL PRICE RETAILERS GENERALLY ARE GIVEN AN ALLOWANCE OF APPROXIMATELY 40-50% BY THE MANUFACTURER TO ADVERTISE THEIR PRODUCT. WHEREAS, IN NEARLY EVERY CASE, DISCOUNTERS ARE NOT ALLOWED TO ADVERTISE THE MANUFACTURER'S PRODUCTS BY NAME AND DO NOT GET AN ADVERTISING ALLOWANCE. WHO, THEN, IS THE "FREE RIDER"?

CONCLUSION

I BELIEVE THAT THIS LEGISLATION, TO CLARIFY THE MONSANTO EVIDENTIARY STANDARD, WOULD, IF PASSED, RESULT IN MANY MORE MERITORIOUS CASES REACHING THE JURY. MORE IMPORTANTLY, THE NEW STATUE IS LIKELY TO DETER FULL PRICE RETAILERS FROM ENGAGING IN ANTICOMPETITIVE PRESSURE TACTICS IN THE FIRST PLACE. BY REMOVING ANY DOUBT AS TO LEGALITY OF PRICE COMPLAINTS, THE MEASURE MAY VERY WELL RESULT IN A DECREASE IN ANTITRUST LITIGATION. I BELIEVE THAT S.430 IS OF THE UTMOST IMPORTANCE.

I SUBMIT THAT THE RECENT COURT DECISIONS REFERRED TO ARE EMASCULATING THE ANTITRUST LAWS AND WILL INEVITABLY RESULT IN GREATLY INCREASED VERTICAL PRICE-FIXING. FOR ALL PRACTICAL

PURPOSES, THEY WILL ELIMINATE ANY EFFORT BY BUSINESSES SUCH AS BURLINGTON COAT FACTORY TO OBTAIN REDRESS AND WILL LEAVE MANY SMALL BUSINESSES VIRTUALLY DEFENSELESS.

WE WOULD LIKE TO COMMEND THE EFFORTS OF SENATORS METZENBAUM, RUDMAN, SIMON AND BRADLEY.

THANK YOU, VERY MUCH, MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, FOR GIVING ME THE OPPORTUNITY TODAY TO ADDRESS YOU ON BEHALF OF OUR INDUSTRY. IT IS A PLEASURE TO BE ABLE TO SPEAK IN BEHALF OF A MEASURE THAT WILL HELP BRING ABOUT POSITIVE RESULTS FOR RETAILERS, CONSUMERS AND MANUFACTURERS ALIKE.

Senator METZENBAUM. Thank you very much.

Mr. Joseph Creighton, Vice president and Senior Counsel, Harris Corporation, on behalf of the NAM.

Mr. CREIGHTON. We thank you very much.

I might say that, speaking on behalf of NAM, NAM has about 13,000 manufacturer members around the country, and although many of those are large companies, actually around 9,000 of NAM's members are companies, small manufacturers, with fewer than 500 employees.

Senator METZENBAUM. Do you want to bring the mike a little closer, please, Mr. Creighton?

Mr. CREIGHTON. I am sorry.

Senator METZENBAUM. Thank you.

Mr. CREIGHTON. So that NAM actually is representing many, many smaller companies. Also it should be made clear that NAM has and has had for many years a policy in favor of competition, in favor of the antitrust laws, and in favor of enforcement of the antitrust laws.

We believe that the antitrust laws are good for all of business, for consumers and certainly for small businesses.

Now, we have submitted, as you know, a written statement which I would like to present for the record, please.

Senator METZENBAUM. It will be included.

Mr. CREIGHTON. At the outset, I would like to make a couple of points that come out of some of the comments that have been made earlier today.

In the first place, the issue is not resale price maintenance, although most of the testimony today is probably related to that. The courts in fact do hold that resale price maintenance is illegal. NAM is not advocating changing that. Vertical price restraints are held by the courts today to be illegal, in spite of the positions or arguments that have been made from time to time by the Chicago school or members of the Department of Justice.

The issue is not whether resale price maintenance is illegal or not, but whether in an individual case there is any resale price maintenance at all, and I would like to come back to that.

The second point is that most distribution of products, or much of it, does not relate to consumer products at all. I would note from the testimony this morning that obviously price cutting in discount stores does exist today, which indicates that I think that resale price maintenance is probably not rampant throughout the country, and it is illegal.

But my company and probably a majority of the companies of NAM do not deal in consumer products and we believe that the antitrust laws are general legislation today—and I concur with Mr. Sims' comments earlier about what we think is the lack of a problem, but to use consumer arguments to apply across the board to cover all distribution problems concerns us very much.

Businesses are different and we should not be all put in the same straight jacket. In distribution, and the smaller a company is and the newer a company is, the more important distribution is—I have been a lawyer dealing with the antitrust laws for over 35 years in private practice in three separate corporations, and I have spent a lot of time advising in these areas in dealing with the problem of

the people who are creating products, selling products, and must get them to the marketplace, and they are competing with other manufacturers.

Resale price maintenance deals only with competition between two dealers or distributors or retailers of the same manufacturer's product, but most of our competition and the most important competition in this country relates to the competition between our company with some other manufacturer of two-way radios, or data processing equipment, or dictating machines, or whatever it is, and we must get our product to market and we are not a large company. Although our company is large in total, most of its parts are relatively small, for instance, in semiconductors we have 2 percent of the market.

We sell sometimes directly but most smaller companies; and certainly a new company with a new product, must use a distributor, and we have to plan, and we have to be able to terminate those that are not doing a good job, and we believe that just because we have gotten a complaint it does not follow that we are trying to maintain prices.

What we are trying to do is have good distributors and when they do not do sales promotion, marketing, inventory, or service, then we feel we should terminate them.

Thank you.

[The prepared statement of Mr. Creighton follows:]

MANUFACTURING CREATES AMERICA'S STRENGTH

TESTIMONY OF
JOSEPH R. CREIGHTON
ON BEHALF OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS
GIVEN BEFORE
THE SUBCOMMITTEE ON ANTITRUST,
MONOPOLIES AND BUSINESS RIGHTS
OF THE UNITED STATES SENATE
ON S.430
THE RETAIL COMPETITION ENFORCEMENT ACT OF 1987
APRIL 23, 1987

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EXECUTIVE SUMMARY

In this testimony, NAM reiterates a long-standing policy of support of the antitrust laws, and cautions against adoption of S.430, the "Retail Competition Enforcement Act of 1987." S.430 would relax the evidentiary standard established by the Supreme Court in the Monsanto decision that termination of a dealer against whom pricing complaints had been filed by competitors was not in and of itself a violation of the Sherman Act or the Federal Trade Commission Act. Monsanto has given manufacturers confidence that they have flexibility in determining whether to continue a relationship with a dealer or distributor who is not living up to the service and promotional standards of the manufacturer regardless of whether pricing complaints have been received. As a result of the Monsanto decision, most suits initiated by terminated dealers or distributors and based on allegations of price fixing have been dismissed summarily unless independent evidence exists that termination was, in fact, due to noncompliance with a price fixing arrangement.

Mr. Chairman, Members of the Subcommittee, thank you for providing me the opportunity to appear before you regarding the merits of S.430, The Retail Competition Enforcement Act of 1987. My name is Joseph R. Creighton, Vice President-Senior Legal Advisor of Harris Corporation. Harris Corporation is a manufacturer of electronic and telecommunications equipment and systems and, deals extensively with dealers and distributors who market many of its products. I am here today on behalf of the National Association of Manufacturers.

The National Association of Manufacturers (NAM) is a voluntary business association of over 13,000 corporations, large and small, located in every state. Members range from

the very large to over 9,000 smaller manufacturing firms with an employee base of less than 500 each. NAM member companies employ 85 percent of all workers in manufacturing and produce 80 percent of the nation's manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Associations Council and National Industrial Council.

The NAM policy statement on antitrust is very clear in its strong support for the antitrust laws, including effective enforcement. A primary goal of NAM is to maintain free and open competition, which benefits consumers, small manufacturers and business in general.

One aspect of fair and open competition must not be overlooked as the Subcommittee considers S.430. Specifically, to be competitive a producer needs to ensure that his or her operations are efficient throughout both the manufacturing and marketing structures. Most manufacturers compete vigorously with other makers of products of comparable quality. Recently this competition has intensified even further due to the entry of foreign competitors. The producer must have the ability to review the operating structures and to exercise flexibility when changes are warranted. Such flexibility must include the power to alter the flow of distribution.

Up until the Supreme Court reached its landmark decision in Monsanto Company v. Spray-Rite Service Corporation, American manufacturers were in a position of constant fear of lawsuits when terminating dealer or distributor relationships. This was true even when the termination was well deserved for reasons having nothing remotely to do with resale price maintenance. For this reason, NAM filed an amicus brief in the case.

The problem for many businesses was that other dealers may have complained about the pricing practices of the dealer in question. Even if the manufacturer was certain that there were no antitrust considerations in its decision to terminate the dealer, it still had to weigh the costs of almost certain litigation initiated by the potentially terminated dealer. In other words, once a manufacturer established a relationship with a dealer or distributor, there was little he or she could do to enforce policies regarding the quality of service, customer education, promotion, warranty work or sales practices.

This often led to the problem of "free riders." As discussed by the Supreme Court in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 55 (1977), free riders are distributors who fail to carry out education and promotion activities considered essential by a manufacturer to the furtherance of its products. Free riders are thereby able to lower costs in order to cut prices. This is a problem for the manufacturer as well as a free rider's competitor dealerships, since the manufacturer could have established such policies in an effort to advance overall market share and enhance competition in the relevant market through superior quality of service or promotion. Under this arrangement, all dealers and distributors benefit, as does the manufacturer. In addition, the consumer is better served and is able to expand his or her product choice on a more informed basis.

As the Seventh Circuit noted in its ruling in Monsanto, the case of Battle v. Lubrizol Corporation, 673 F.2d 984 (8th Cir. 1982) revealed the risk to which a manufacturer was exposed in attempting to ensure that a dealer or distributor performed the obligations for which he or she contracted. In short, the case centered on a rust-proofing manufacturer's termination of a

distributor who had failed in his obligation to develop sales for the product in the marine field. The manufacturer discovered the plaintiff's nonperformance after another distributor complained that the plaintiff was cutting prices in the automotive field. The Eighth Circuit found that the plaintiff was entitled to a full jury trial based on the per se theory that the manufacturer had engaged in vertical price fixing.

The Lubrizol case illustrates the dilemma faced by a manufacturer prior to Monsanto. If he received any complaint alleging price cutting by a dealer or distributor, what actions could he pursue? Could he investigate the reasons for price cutting? If he determined that the price cuts resulted from savings gained through nonperformance of service, promotional, or consumer education activities he established and that were followed by other dealers and distributors, could he terminate the relationship for failure to uphold the manufacturer's standards? In most instances prior to Monsanto, responsible legal counsel would have had to advise that the manufacturer retain a relationship with the non-performing dealer.

Aside from the high costs of litigation that would certainly ensue following a termination action, a full-blown jury trial would have been risky to the manufacturer. The possible treble damages liability could well have turned on whether a jury believed that the manufacturer (1) "conspired" with the complaining dealer (or dealers) and (2) sought to "fix" or "stabilize" prices in the resale market. Furthermore, it is not inconceivable that a jury would regard a single complaint from one dealer as a request to terminate another dealer, or that a jury would infer that the termination represented an "agreement" with the complaining distributor(s) to "fix prices."

S.430 states that an inference of conspiracy can result from the manufacturer receiving "from a competitor of the claimant a communication regarding price competition by the claimant . . . and in response to such communication terminated the claimant . . . or refused to supply . . . all or some of such goods requested by the claimant." (Emphasis added.) Whatever the meritorious intent, this language may have devastating consequences. What would happen, for example, if a supplier received one price-related complaint about a dealer and terminated the dealer some time later for totally different reasons? Must the manufacturer undergo a jury trial to prove that the complaint was merely placed in a file and not even reviewed at the time of termination? It is even foreseeable that an unscrupulous dealer or distributor may act in such a way to provoke a complaint and then threaten to sue if a notice of termination is received.

One may well argue that the potential costs of legal action would be high for the terminated dealer or distributor, as well as the supplier. The difference, however, is that the costs of litigation would outweigh the benefits for the manufacturer while the benefits of treble damages would outweigh the costs for the terminated dealer or distributor. The latter would have nothing to lose except possible legal fees but they may regain their franchise; the manufacturer would have nothing to gain (especially when one considers that the termination was probably for good cause) but would expose himself to treble damage liability as well as cost of counsel. In addition, since many plaintiffs arrange for legal fees on a contigency basis, the lure of treble damages will often provide additional incentive to an attorney to gamble on a case he otherwise might have counseled against.

In cases where price cutting is accomplished through inadequate and substandard service commitments of a dealer or distributor, the consumer may in fact be a loser as well. In most cases, however, the ill-will of a consumer in need of quality service will fall on the manufacturer and not on the resaler.

An important aspect to bear in mind is that in many instances a dealer or distributor is much larger than the manufacturer in question. Unfortunately, it seems that many people have in mind a large corporation that acts against a small dealer or distributor operation. While this may at times be the case, small manufacturers are much more reliant upon larger dealers and distributors with the resources to service and promote their products. If a dealer or distributor is acting as a free rider, the small manufacturer will not realize the full potential of returns to which he or she is entitled for the product. Smaller manufacturers in particular need the clarity and assurances established in Monsanto that they can terminate those dealers who fail to participate in service, promotional, or consumer education programs and whose actions cause consumer or retailer ill-will toward the product.

Lest one forget, Monsanto did not abolish the rule that the enforcement of resale price maintenance agreements is illegal; on the contrary, through other evidence the Court ruled in favor of the dealer. The most important aspect of this decision to the business community is that a manufacturer has flexibility in deciding when to terminate dealers who are not performing according to the company's standards. Currently, a manufacturer need not fear that a legal termination for good cause -- and not based solely on a failure to illegally maintain resale price levels -- would result in the huge costs and risk of litigation

merely because another dealer has filed a pricing complaint against the dealer or distributor in question.

NAM believes that Section 2(a) of S.430 would unnecessarily return the confusion, disarray, and uncertainty that existed prior to Monsanto in deciding to terminate a dealer or distributor relationship. Price cutting by dealers or distributors may be due to failure to perform functions that the manufacturer deems necessary and that are performed by other dealers or distributors. In short, price cutting may be an indication of non-compliance with the goals of the manufacturer, and the manufacturer should be able to investigate whether obligations that had been agreed to are being performed upon receipt of a complaint. This is not to say that a dealer or distributor whose operations are perhaps more efficient or less costly than his competitors should be terminated for the sole reason of selling the product cheaper than his competitors.

NAM does not object to the language contained in Section 2(b), but we believe it is unnecessary to enact such a provision. Section 2(b) says that the seller and purchaser of a good or service may not conspire to fix prices.

To reiterate, NAM has a long record of support for the strict application and enforcement of the antitrust laws. Legitimate instances of price fixing should be prosecuted either privately or publicly in order to provide consumers with the full benefits of competition and the free market. Termination of a dealer who cuts prices is not always due solely to these pricing

practices, however. Manufacturers need the assurances of Monsanto that dealer and distributor relationships are subject to enforceable standards of service quality, promotional and consumer education efforts, and aggressiveness in expanding the sales of a product. NAM, therefore, strongly urges the Subcommittee not to report S.430 favorably.

Once again, Mr. Chairman, NAM appreciates the opportunity to testify, and I am prepared to answer any questions the Subcommittee may have. Thank you.

Senator METZENBAUM. Thank you very much, Mr. Creighton.

Let me ask you and Mr. Sims a question: Resale price maintenance is illegal right?

Mr. CREIGHTON. I think that is what the courts hold today.

Mr. SIMS. That is correct, yes.

Senator METZENBAUM. Do you personally disapprove of resale price maintenance?

Mr. CREIGHTON. I think in some cases for small manufacturers it might very well be justifiable, but I am not advocating it, I mean I am not advocating change of the law.

Senator METZENBAUM. Mr. Sims?

Mr. SIMS. I think resale price maintenance can in some instances be anticompetitive and it can in other instances be pro-competitive.

Senator METZENBAUM. But do you generally support the law as it is, that is the law that resale price maintenance is illegal?

Mr. SIMS. The testimony that we are giving here today assumes the existence of per se illegality for RPM.

Senator METZENBAUM. Now, the Chair starts off from the perspective that free competition makes the free enterprise system work well and the Chair also will share with you the fact that I have had dealers in dinnerware, ice cream, in other kinds of products, who have personally come to me and asked for assistance.

The staff just pointed out to me that I very rudely started asking questions before Mr. Alioto had been given an opportunity to speak. I apologize, Mr. Alioto. I will come back to you if you will bear with me.

People have been told either you quit discounting or we are going to pull the product, and in some instances they have been told that the product is pulled. In fact, in some instances the product has been pulled and then they had to go around and bootleg the product.

We know that in the *Belk* case, in the *Belk* case you had a full-price store which had unequivocally relegated the manufacturer's goods to the bargain basement, did not invite the manufacturer to its trade show, the manufacturer wrote a letter to the discounter and referred to the low prices as a "situation" that "should not exist." Where does the manufacturer get off telling him what price he can sell his product at?

The letter then goes on to say that the low prices exist due to a mistake on our part. The mistake was in selling to the retailer, obviously, and it goes on to promise to make every effort to see that the situation is rectified.

Then the full-price store official attempts to destroy all copies of the correspondence. The discounter is terminated. I cannot believe that you think that is not sufficient evidence to submit to the jury, the question of whether or not there ought to be a verdict in favor of the plaintiff. And we have instance after instance where the manufacturer has used similar tactics, and you are here saying we do not believe the law should be changed.

Let me give you another one. Mr. Milstein mentioned it. In a letter from the Youth Fashion Guild, and the letter was addressed by the Youth Fashion Guild to its members. In it they say it will be interesting to see the outcome of this unfortunate battle of giants as a result of the Supreme Court ruling on the *Monsanto* case,

which stated that a manufacturer was a free agent and could arbitrarily determine to whom he would sell his product—underlining—unless—and that word is underlined—proof existed that he was forced into making that decision by another interested party. Any manufacturer can now control the distribution of his own products.

So, whenever a salesman or a manufacturer tells you that he is legally forced to continue selling to a discounter who has had previous access to his line, you can tell them that they are talking through their hats. However, do not use threats to force them to discontinue the sale of their product to anyone. It is your privilege and right to refuse to buy any line that is peddled to a discounter, but under no circumstances should you say it is either them or me.

Well, that is the cuteness of the letter—do threaten them but do not get caught with your hands red. I just have some difficulty in understanding where you are coming from and, having made that as a prefatory statement, let me say, Mr. Creighton, that some years ago when your company was not Harris but it was Harris Intertype something or other——

Mr. CREIGHTON. Yes.

Senator METZENBAUM. Is that right?

Mr. CREIGHTON. Harris Intertype Corporation.

Senator METZENBAUM. Yes. I was in the Ohio Legislature and we were successful in providing language in the legislation that made it possible for Harris Intertype to be one of the people who stood up and said we support the legislation which was the Ohio Retail Installment Sales Act, which had extremely strong teeth in it.

Now, I want to say to you, Mr. Sims, speaking for the ABA, and to you, Mr. Creighton, speaking for the NAM, and to the rest of you at this table that the author of this legislation is not that positive that he has got every comma in the right place and every semicolon in the right place, and I have tried in the legislative process to find a way to move legislation forward and get all parties on board.

Let me just say to you, my door is open to you, if you have some thoughts on the subject, we will be willing to discuss them with you, provided that you understand what the overall thrust of this Senator's and my colleagues' concern is.

Now, having made that speech—and I was going to ask you some questions—I think maybe I ought to let Mr. Alioto go before you respond, and I apologize to you for that.

Mr. Alioto, we are happy, to hear from you and apologize for not recognizing you earlier. Please be good enough to say "hello" to your father.

Mr. ALIOTO. Thank you very much, Senator, and Senator Humphrey. It is a real pleasure, of course, to appear before your committee on what I regard to be a very important issue.

My name is Joseph Alioto. I am an antitrust plaintiff attorney, a trial attorney, and have been for almost 20 years now. I think that I come into contact with the real guts of S. 430, because I have to treat or have to deal with jury instructions and the kind of evidence that could get someone to a jury.

I see the main point, Senator, as being a very simple one, and that is whether or not anybody has any problems having a jury

decide whether or not a manufacturer cut off a discounter because that discounter was giving price competition to somebody else. That is the issue I think in a nutshell.

We cannot argue about resale price maintenance and we could argue even of the Justice Department, of their unwillingness to enforce the law. We could talk about those things, but this bill treats the important issue of when an attorney and a client is in the courtroom, what kind of evidence the judge is going to let a jury decide the issue of whether or not someone was fixing prices.

The reason that the bill is so important is because in the arena the new issue, as defined by the Supreme Court under *Monsanto*, makes it almost impossible as a practical matter for any antitrust lawyer to be able to get any case to a jury almost under any circumstances, and the progeny of the cases that followed *Monsanto*—and, Senator, you mentioned one of them, but that is not the only one—are coming up with incredible pieces of evidence that at any time before in the history of the antitrust statute would not only have been sufficient to get to a jury but in many cases would require a directed verdict.

You have people destroying documents, showing that they understand that the documents themselves are illegal. You have people using their economic power and strength to cut off a price cutter, someone who wants to compete. You even have—Senator, you mentioned that you should not, this notice here that says you should not give threats.

Even in the *Belk* case they said it is okay, to give threats, it is okay to coerce and it is okay to intimidate. As a trial lawyer, you wonder what is not okay and the reason you do that is because *Monsanto* gave a very straight statement and from that the courts that have been following *Monsanto* have run havoc over resale price maintenance law.

The court in *Monsanto* told us, as trial lawyers, told us that we are going to be told that we cannot get to a jury, an impartial jury cannot even hear the evidence, cannot even hear it unless we present evidence which excludes the possibility, not probability, but excludes the possibility that the manufacturer and the non-cutoff distributor were acting independently.

Now, that means that they can, if they want to and they will, and these cases following it, the *Belk* case, the garment case, the *Sharp* case, the *Teague* case, the *Cabe* case, right down the line they are doing the same thing.

The point is that a defendant who has engaged in a price fixing conspiracy, who has deprived somebody of the opportunity of competing on the merits, who has deprived the public of an opportunity to be able to choose between the same products at different prices, that a defendant will be able to come into a court of law and avoid even having a jury make the determination of whether they fixed prices by simply bringing in a sack of rabbits and letting them run all over the courtroom, requiring the plaintiff to search down and get down each one of them before he even gets to the jury.

That is what that means. If you are an antitrust attorney and, of course, the Department of Justice is doing nothing in this area, so the only ones who are going to enforce this law as a matter of fact

are going to be private plaintiffs, and these private plaintiffs are going to be people who wanted to compete and were cut off, and when they go into court they are going to be told that they have to present evidence excluding the possibility of independent action.

What your bill does, what this bill does is not only fair, it used to be the law and it states simply—as a matter of fact it is even stronger I think than it should be, but it states simply that if somebody complains to the manufacturer about a price cutter and the manufacturer, in response to that complaint, cuts him off, that should at least go to a jury, a jury should at least decide it. It does not say that he is liable. It says only that it should go to a jury, and I would remind the panel and Senator that the Supreme Court itself with respect to that—and then I am going to be quiet—the Supreme Court, with respect to juries, has told us in the old Beacon Theater, told us that the jury is an essential part of the congressional plan of making competition rather than monopoly the rule of trade in the United States.

So the real question of anybody who objects is what is the matter with the jury deciding it, are they not smart enough, are they not bright enough, do you fear their ability to come in and under Federal law unanimously decide an issue? That is what it really comes down to.

Thank you very much.

Senator METZENBAUM. Thank you very much, Mr. Alioto.

Mr. Sims, did you want to respond?

Mr. SIMS. Well, I would like to respond just momentarily to Mr. Alioto, who of course is a skilled advocate. As all skilled advocates know, the best way to make the argument is to make it simple and he has made it simple, but I think it is more complex in fact than he has been willing to recognize here.

There is in fact, and has been since 1919, a clear rule of law that a manufacturer may unilaterally decide how to distribute his products. A manufacturer may decide to distribute his products himself, he may decide to use distributors, he may decide to use exclusive distributors in particular territories—he may decide to have all sorts of different distribution schemes and he is entitled as a matter of law to make those decisions any way he sees fit.

The problem with being very simple in this area and focusing solely on the possibility of RPM is that, if you pay no attention to the Colgate rights of the manufacturer and the manufacturer's legitimate interest in deciding how to distribute a product in a market in which he has significant competition, you tend to discourage the manufacturer from making those distribution decisions that in fact are procompetitive, that produce lower prices and better products for the consumer. That is the tension here, the tension between competition between individual manufacturers through their respective distribution schemes, and competition between dealers selling the same manufacturer's products. They both have interests, they both have rights, but the complicated task for a court or for the Congress, for that matter, is to reconcile that tension in a way which produces an optimal result.

Our concern is that this bill will not make that reconciliation in an optimal way and will produce in fact a negative result.

Senator METZENBAUM. Mr. Sims, is it not correct that the American Bar Association does not have a position opposing codification of the *per se* rule to vertical price fixing cases?

Mr. SIMS. The Antitrust Section has taken no position on that section of the law, no.

Senator METZENBAUM. So that there is only one part of my bill that you are speaking against?

Mr. SIMS. That is correct.

Senator METZENBAUM. Mr. Creighton, did you want to respond to my question?

Mr. CREIGHTON. There are many things I would like to respond to, and it is difficult to choose. I would like to reiterate the point that I made before, that much of us are concerned with things other than consumer goods, and I think it is important what Mr. Sims was saying, that a manufacturer must get its products to market at competitive prices, with proper information about the product. It has to maintain quality in certain instances until it gets to the marketplace. It has to have installation in many instances, it has to have available product to be inspected, demonstrators. All of these things are a part of distribution.

Price in much of the economy is not the only thing. It may in many instances not be the most important. In most of our companies——

Senator METZENBAUM. Is not the issue we have before us today:

Mr. CREIGHTON. No, it is not. That is not the issue. The issue is not resale price maintenance, the issue is whether a company can terminate a distributor on its own independent decision when there is no proof of a conspiracy, there is merely a complaint from one person, and the issue is whether or not that creates, as S. 430 says, a presumption, or an inference which is a presumption which says that in the absence of any other evidence I guess it wins. Now, that is a very serious thing for a manufacturer to not dare to change its distribution system just because somebody made a complaint.

Senator METZENBAUM. Mr. Creighton, I have to point out to you that that would not be enough under the proposed legislation. The legislation would require evidence that the person who sells the goods or services for resale terminated or refuse to supply the claimant "in response to" such communication.

In other words, you would not have just enough that there was a termination. You would have to have that predicate that the action was "in response to" that kind of action.

Mr. CREIGHTON. And that is a change, a substantial change, in the substantive law of antitrust.

Senator METZENBAUM. But I do not understand one thing. You are a free enterprise advocate. The NAM has red, white and blue all over its papers here. It is beautiful. It is absolutely lovely. Free enterprise means free competition.

Mr. CREIGHTON. That is right.

Senator METZENBAUM. These discounters are engaged in free competition.

Mr. CREIGHTON. And resale——

Senator METZENBAUM. They try to sell at a lower price. The ladies come before us and they tell us how they have to buy——

Mr. CREIGHTON. And that is the law today and we are not asking to change that.

Senator METZENBAUM. What I ask you is how are you going to get that evidence before the court?

Mr. CREIGHTON. Well, the law of conspiracy, the law today, in spite of Monsanto, it does not require tangible written agreements, it does not require witnesses that heard somebody say something. Conspiracies can be proved by many, many things.

Well, resale price maintenance, the law of the Sherman Act, which this purports to amend, is a contract, combination or conspiracy to restrain trade or fix prices. If there is no agreement and there is no conspiracy, there is no application of the per se rule about price fixing under pre-Monsanto law. Therefore, when you make the law say that if there is a complaint and independently, and for whatever reason, the manufacturer decides independently to do it, there is no price fixing agreement and the——

Senator METZENBAUM. There must be response to the communication.

Mr. CREIGHTON. But a response, when somebody brings to my attention that there is a problem, I have not reached an agreement with him just because I saw it. Agreement means agreement, and we are talking about proof, and S. 430 wants to dispense with the proof and merely say that absent an agreement, just because once this is brought to me I react, and I think that is a basic change of the substantive law of antitrust in this country and I think you are relying on consumer things. You are going well beyond that to cover all manufacturing—remember, now, most of us—one of our biggest customers is AT&T, and IBM, you know. They are not consumers. This is serious legislation. I agree, this is serious legislation.

Senator METZENBAUM. Well, we did not think it was frivolous.

I am going to ask—Senator Specter has a question and then I am going to give Mr. Alioto a chance to respond.

Senator SPECTER. Mr. Creighton, just briefly, following up on your statement, what would the minimal amount of evidence be necessary under your view to constitute an agreement or otherwise sufficient evidence to get to a jury?

Mr. CREIGHTON. Well, usually these things in an industry develop over a period of years, so there is a record of what the manufacturer has done over a considerable period of time.

Now, the Colgate doctrine says that the manufacturer has the right to decide on his own distribution system and the right to terminate distributors. But if it is price cutting alone, you see, I think that there is going to be evidence of that. But the facts we deal with are a case where you have a distribution system, with all of these things you want a distributor to do, a distributor in one—say there are two people in the district, one is advertising.

Remember, now, we are not talking about branded things, we are talking about things one has to advertise. That they must do. They have to stock. They have to promote in the local market. So one of them does this and the one next to him does not do it—does not bear the cost, and then cuts the price.

Now, it is not a conspiracy if a manufacturer, finding out that one of these two distributors is doing all the work and the other is cutting the price to make the profit, to say to them all you ought to all do it. Now, he is in this problem, and that is that if he calls—our company calls—our distributor who is not doing the advertising and says to him, "You ought to advertise," and he says, "I will not," and then you say to him, "Well, if you do not we will cut you off." Now if he does not and we cut him off, there is no agreement. And you can see the dilemma we are in. If he does stop price cutting and he does start doing what we asked him to do, then we have got an agreement between us and him that is probably a violation of the antitrust laws. So we cannot do that. So we are forced in the situation where all we can do is look at the situation and take independent action. We cannot talk to the complaining dealer and we cannot talk to the dealer that is not doing these things and reducing his price to take advantage of it.

Senator SPECTER. But you postulate two courses of action, one where you cut off the dealer, another where you tell the dealer what he needs to do to stay on.

Mr. CREIGHTON. Right, then if he does it——

Senator SPECTER. You get to just about the same results and that is a carrying out of what your policy is, but you are saying that in one situation there is the absence of an agreement and therefore not a violation——

Mr. CREIGHTON. That is right.

Senator SPECTER [continuing]. And if you cut him off then——

Mr. CREIGHTON. You are risking a price-cutting agreement between us and the price-cutting dealer.

Senator SPECTER. Well, there is no violation of the law to simply cut him off.

Mr. CREIGHTON. That is right, except now it would be a violation of the law because the issue then is, did we do it in response to the complaint from the other dealer.

Senator SPECTER. Would that be sufficient to make a jury question under present law?

Mr. CREIGHTON. I believe the *Monsanto* case says that something more than that is needed. It does not say what.

Senator SPECTER. It is not sufficient.

Mr. CREIGHTON. And S. 430 is designed to change that. That is my understanding of it.

Senator SPECTER. Well, I am troubled by where you come out, but I do not know if you can draw a dotted line instead of a straight line, but that is what we are struggling with. Thank you very much.

Thank you, Mr. Chairman.

Senator METZENBAUM. Mr. Alioto, would you like to respond briefly?

Mr. ALIOTO. Yes, please, Senator. The law prior to the buildup to Monsanto was simply that if you had a competing distributor who complains to the manufacturer about the other prices and wanted him cut off, if you just had the complaint and then you subsequently had the termination, then it was up to the jury to make the connection as to whether or not the reason the termination was done was because of the complaint. So it was much broader in those

days. That was under the Girardi decision, out of the Ninth Circuit. This was the development of the law at that time.

Then afterwards, after the fair trade laws were wiped out, and there was more discounters, now they started directly going against the discounters and the law prior to Monsanto was it was required, it was more of a requirement, they said now if you have proof that the discounter was cut off in response to a price complaint by a competitor, then that is sufficient to get to the jury, and Monsanto said no, it was not, and the first thing they did was to cite the decision by the Seventh Circuit and said that is not sufficient any more.

What they have done now is they have gone further and said not only is that not sufficient, but you will not be able to get to the jury unless you exclude all other possibilities of independent action. So when Mr. Creighton says now if you apply Rule 430 if it becomes law, that means you go to the jury. Well, all that means is that is when Mr. Creighton and his friends and the ABA—I would not get upset about the ABA, they have not been on target in antitrust in a long time, you know that—but then it is their turn to come forward and say, hey, we did not do it in response to that, we did it for this, we did it for that. That is called a defense case in chief, a defense the jury decides, so again this issue is to them too are you afraid of competition and are you afraid that competition should be decided on the merits by a unanimous and impartial jury.

Senator METZENBAUM. Thank you very much.

Mr. Creighton, does the NAM have a position opposing codification of the per se rule, the vertical price fixing cases?

Mr. CREIGHTON. I do not think NAM has taken any position on that.

Senator METZENBAUM. Would you let us know if you do?

Mr. CREIGHTON. Yes, sir.

Senator METZENBAUM. I want to say to the members of the panel that I do have some additional questions but I looked at the clock and found that if I am going to get Mr. Oliver on this morning—I am sorry, do you have any questions?

Senator Grassley, do you have an opening statement?

Senator GRASSLEY. No, I do have a question which would best be directed toward Mr. Sims and Mr. Creighton.

I need to know if there is any way in which this bill could possibly damage price competition at the retail level. That is what I need to know, price competition. Is this bill going to in any way damage that?

Mr. SIMS. Well, I think the answer to that is yes, it certainly has that potential, Senator. Price competition at the retail level is the product of a lot of forces. One of the significant forces that impacts on the level and vigorousness of price competition at the resale level, at the retail level is the level of competition among manufacturers of various kinds of products.

For purposes of illustration, the worst case potential of this legislation would be that it could significantly limit a manufacturer's flexibility in dealing with ineffective and uncooperative distributors and thus impair the manufacturer's ability to be price competitive at the maximum ability that he could have but for that im-

pairment. So the answer is yes, I think it could have an effect on price competition and it could have a negative effect.

Price competition at the retail level is a composite of many factors and only one of those factors is whether or not there is a discounter selling a particular product in a particular way at a particular time.

Senator GRASSLEY. Mr. Creighton?

Mr. CREIGHTON. I think it can harm it in many, many ways. It harms other competition as well, in quality and other things as well, dealing strictly with price competition, and I am using the retail level to mean to the ultimate buyer because many products are not sold to just consumers.

If you take a company—I can give you an example of where we have tried in the past, our division involved is much smaller than most of its distributors, nationwide distributors, and it is in competition with a lot of other bigger producers. And it must develop a pricing strategy that makes a profit or it does not try to develop a product. It is a high-tech product. These are electronic distributors.

So what it must do is—what they try to do is—have a policy of selling large quantities where you have substantial savings, you sell your product with your own direct sales force to larger companies. These are all big manufacturers, IBM, AT&T and people like that. But you need to market to the smaller ones around the country and you need to have a pricing strategy whereby the distributor—that you give a price so that he will, you know, work up the market for those smaller customers. You will have to give him a price that enables him to do that.

Instead of doing that, if he takes that price and makes it easy by just going and calling on AT&T, you see that it won't work. So that is destroying the competition, it is destroying between our company and all our other competitors that are larger and stronger. So I think definitely it does affect price competition at that level.

Senator GRASSLEY. I do not know whether Mr. Stevenson or anybody on the other side wants a rebuttal.

Senator METZENBAUM. Mr. Milstein, would you like to comment on whether or not you think that this bill will damage price competition at the retail level, because I am so aghast at Mr. Sim's response that I cannot believe he made it. There is not any question about it, this bill has only one concern and that is to provide competition at the retail level. That is the whole thrust of this bill.

So when you say it will damage it, at least Mr. Creighton said, well, I think it has to do with quality and other aspects as well, but for you to say yes it will, Mr. Sims, I just cannot believe you are speaking for the American Bar Association Antitrust Section, because there is not any argument that this bill is a consumer oriented bill, this bill is a procompetition bill having to do with competition in the marketplace at the retail level. And when you give this answer to Senator Grassley, I do not believe you really meant that answer because you know it is not factual.

Mr. Milstein.

Mr. MILSTEIN. This bill gives the discounter a chance to go to court if there is an injustice. It does not guarantee him that he will win, but it gives him a chance to defend his business and his customers against monopoly practices.

Senator METZENBAUM. What about the question of Senator Grassley, and that is will this bill damage price competition at the retail level?

Mr. MILSTON. There is no way they can damage price competition at the retail level.

Mr. STEVENSON. As a matter of fact, it would help the price competition at the retail level because as a practical matter it is the only way to enforce the law.

Mr. ALIOTO. Senator, if I might add to this that if it is not passed, retail level competition is in real danger.

Mr. SIMS. Senator, if I might respond briefly to that point, I certainly do not have any doubt about the sincerity of the goals of the sponsors of this legislation. What I was trying to explain, and probably did not do as well as I should, was that there are in fact a variety of ways in which this legislation could reduce competition, which has to have an effect on price competition as well.

For example, let me just give you one illustration: Suppose that a manufacturer has a preexisting program of restricted distribution of some kind—make it the simplest kind where he has announced prior to entering into any distribution agreements that he will terminate any distributor who discounts and he does that for his own good reasons. He gets complaints about a distributor who is violating that rule from somebody who is being injured by that, another distributor. He then investigates and determines that the complaints are in fact true, and terminates that distributor.

Under the law today, if those are all the facts, that case is not going to go to the jury. Under this statute, if those are all the facts, that case is probably going to go to the jury. The result of that change is going to significantly diminish the ability and willingness of that manufacturer to take that step, once he has received the information that tells him that his distributors are not doing what he announced was his distribution policy. The result of that is likely to make that manufacturer less competitive in the marketplace, because that is why he adopted the policy in the first place—to make himself more competitive. The result of that manufacturer being less competitive has to mean that competition in the marketplace is reduced and that has to have an adverse effect on price competition. That is what I was trying to say.

Senator METZENBAUM. You know, Mr. Sims, the fair trade laws gave manufacturers the right to maintain vertical price fixing. It was repealed by the Congress in 1975, with the support of no less a member of this body than Senator Thurmond who said that lower prices should be available to consumers and a substantial contribution should be made in the effort to control inflation.

I have concluded that it is less objectionable to enact legislation disallowing fair trade laws than it is for the Congress to continue to sanction price fixing, the results from the existing fair trade laws. Well, this is just a continuation of that and that is the question of the ability to maintain an action in court which is not possible or very difficult at the present time, and this is an attempt to give the distributor the right to maintain such an action when and if he is cut off, and particularly in response to a complaint from a competitor.

Senator Grassley.

Senator GRASSLEY. I am finished with my questions.

Senator METZENBAUM. Thank you very much.

Mr. MILSTEIN. Could I say something?

Senator METZENBAUM. Certainly.

Mr. MILSTEIN. I am also aghast at the two gentlemen, Mr. Creighton and Mr. Sims, coming up with theoretical things that have nothing to do with the consumer market or the retail market. I have to come to the conclusion that the reason there is no full price retailer testifying against S. 430 because they would not have the guts to come here and come out for price fixing because it is an unpopular thing with the public and the consumer. These people are being used as cat's paws on theoretical terms that do not exist in the real world.

In the real world, the facts are as I stated, as Mr. Alioto gave, as Mr. Stevenson described, and the two ladies whom you had appear before you, representing the consumers, you cannot fool the consumers. You cannot fool women shoppers. They know the difference.

Senator METZENBAUM. I want to thank the members of the panel. That will conclude the panel's presentation. We have one last witness, Mr. Daniel Oliver, Chairman, Federal Trade Commission.

We will recess for one minute.

[Short recess.]

Senator METZENBAUM. The committee will come to order.

Mr. Oliver, I want you to know that you missed the best part of the hearing. Please proceed. You know our 5-minute rule.

STATEMENT OF DANIEL OLIVER, CHAIRMAN, FEDERAL TRADE COMMISSION, ACCOMPANIED BY JEFFREY ZUCKERMAN, DIRECTOR, BUREAU OF COMPETITION

Mr. OLIVER. Thank you, Mr. Chairman. Let me introduce first, if I may, Mr. Jeffrey Zuckerman, who is the Director of the Commission's Bureau of Competition.

Senator METZENBAUM. I want to say to Mr. Zuckerman, I did not realize that he was the Director of the Bureau of Competition. I do not think he has been there that long, but I wanted to say that before you came, with this previous panel I did make the observation that I had totally forgot that the Bureau of Competition exists at the Federal Trade Commission. I would like to have my staff at some point be advised—I know you have only been there a short time, Mr. Zuckerman—what the Bureau of Competition has done in the last several years, because I cannot find anything. You do not hear much about it any more. It used to be very active, part of your agency, but that is not the thrust of this hearing this morning, but I did want to say that I had made a public comment and I wanted to relate that to you.

Mr. OLIVER. Mr. Chairman, thank you for the invitation to testify on S. 430. The majority of the Federal Trade Commission joins with me in opposing this legislation and we have provided a copy of the Commission's testimony to the committee.

As I understand it, S. 430 is intended to aid private actions under the antitrust laws to make it easier to attack vertical price re-

straints or resale price maintenance. The Commission opposes this legislation. It is special interest legislation clearly intended to benefit a special group of dealers—discounters—and it would have that effect at the expense of consumers, manufacturers and other dealers. It might well be harmful even to the interests of those whom it is designed to help.

The rationale that has been employed for holding certain private business practices per se illegal under the antitrust laws is that those practices will almost always cause consumer injury by reducing output and increasing prices.

One has to ask why this could be. Why would any manufacturer favor the use of resale price maintenance if the result would be higher prices at the dealer level and presumably, therefore, fewer sales of the manufacturer's products. It cannot be that manufacturers just want consumers to pay more. They could simply raise the wholesale price to do that, and then at least the manufacturer would benefit from the higher prices instead of the dealer.

Manufacturers could also charge higher prices, perfectly legally, I might add, simply by opening their own retail outlets. That is what Sears does. But manufacturers will not be able to charge more than the market will bear. Clearly, there must be some other reason the manufacturer wants the dealer to charge a particular price.

That other reason is that by protecting dealer's margins, manufacturers encourage dealers to sell more of their products, not less. This result is exactly the opposite of one that should merit per se condemnation under the antitrust laws.

The Supreme Court recently recognized that non-price vertical arrangements can promote increased sales by helping manufacturers legitimately combat free riding on the sales efforts of other distributors. The Court held that non-price vertical arrangements therefore should be judged under the rule of reason.

There is also abundant evidence that resale price maintenance, like non-price vertical restraints, can help manufacturers efficiently distribute their products. Thus resale price maintenance should not be held to be per se illegal but instead should be judged under the rule of reason.

Unfortunately, S. 430 would move antitrust law in an exactly opposite and I believe undesirable direction. There are three main reasons why this bill is not in the public interest. First, it will hurt consumers. Consumers may be denied valuable dealer-provided services that manufacturers believe will result in more consumer demand for their products and more sales.

Second, the bill is likely to be harmful to businesses. It is procompetitive for manufacturers to communicate with their customers. Such communications help manufacturers make informed decisions about how best to market their products. S. 430 will chill those communications. As a result, manufacturers may respond either by using less efficient forms of distribution, such as nonprice restraints, when resale price maintenance would be more effective or less costly, or they may integrate, like Sears, into retailing themselves when they would otherwise not.

Ironically, this bill may also hurt discounters. It provides an additional incentive for vertical integration by manufacturers who,

following such vertical integration, would have no reason to sell their products to discounters. In addition, the bill may encourage retailers who are hurt by free riding to substitute house or store brands that are not available to discounters for manufacturers' brands they currently carry. This will clearly harm some manufacturers, but it would also lessen the value of affected brands to discounters. Discounters, of course, have less incentive to carry brand name products that are not carried by high-priced stores.

Further, the bill may make manufacturers reluctant to deal with discounters at all if the dangers of treble damage liability are large when discounters are terminated.

Third, S. 430 would create a new conspiracy standard that is inconsistent with the current body of law on that subject. There are two elements presently needed——

Senator METZENBAUM. Would you try to summarize, please?

Mr. OLIVER. I just have two more paragraphs—needed to establish a conspiracy, a meeting of the minds and unlawful purpose. It is not apparent that either would be required by this bill.

Briefly, then, we conclude that S. 430 will help neither consumers nor businesses, including discounters. S. 430 would move the law respecting retail-price maintenance in the wrong direction and accordingly is not in the public interest.

Thank you, Mr. Chairman. That concludes my remarks. I would be happy to answer questions.

[The prepared statement of Mr. Oliver follows:]

STATEMENT

OF

DANIEL OLIVER

CHAIRMAN

FEDERAL TRADE COMMISSION

BEFORE THE

SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW

COMMITTEE ON THE JUDICIARY

U.S. SENATE

CONCERNING S. 430

THE RETAIL COMPETITION ENFORCEMENT ACT OF 1987

APRIL 23, 1987

Good afternoon, Mr. Chairman and members of the Subcommittee.

I appreciate the opportunity to comment on S.430, "The Retail Competition Enforcement Act of 1987", which would amend the Sherman Act. The Commission strongly opposes the enactment of S.430 because it could have adverse consequences for competition.[1]

Subsection (a) of S.430 provides that evidence that a supplier had cut off a distributor "in response to" a price-cutting complaint from one of the distributor's competitors would create an inference of unlawful concerted action to fix resale prices. This subsection apparently is intended to overturn Monsanto Co. v. Spray-Rite Service Corp., in which the Supreme Court ruled that a dealer terminated in response to a complaint from a competing reseller does not, in itself, constitute proof of concerted action to fix prices. Subsection (b) apparently would codify the existing per se rule of illegality respecting resale price maintenance.

S. 430 Is Not Consistent With Recent Learning on Resale Price Maintenance

In Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the Supreme Court said that economic effect is the key to applying the per se rule, recognizing that non-price vertical

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[1] Commissioner Strenio concurs in the Commission's opposition to S.430 because, among other reasons, of the bill's vague -- yet apparently far-reaching -- reformulation of the conspiracy doctrine. Commissioner Bailey has not joined in the testimony.

restraints can have beneficial economic effects, and decided that a per se rule was not appropriate for non-price vertical restraints. In GTE Sylvania, the Court did hold that vertical price restraints were different from non-price restraints and should continue to be per se unlawful. A large and growing body of scholarly work indicates, however, that many vertical price restraints, like nonprice restraints, have valid business purposes.[2] There is also abundant evidence, both theoretical and empirical, that vertical price restraints can promote efficiency in distribution -- just as vertical non-price restraints can.

If Congress desires to alter the current state of the law, the available evidence indicates that it would be appropriate to treat vertical price restraints the same as vertical non-price restraints,[3] and subject both to the rule-of-reason standard. In any event, we believe that there is no sound reason, consistent with the purposes of the antitrust laws, for altering the current state of the law, as would S.430, to make the current standard of

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[2] See Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence (FTC Staff Report, 1983) for a summary of the available evidence on the effects of vertical price restraints. The evidence makes it clear that resale price maintenance does not always lead to higher prices, especially when maximum resale prices are involved, and resale price maintenance is often used by small firms with no market power and no ability to engage in vertical practices of any kind harmful to consumer welfare. Thus, vertical price restraints are not one of those business practices that merit per se condemnation because their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality. . . ." National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

[3] Id.

per se illegality for resale price maintenance stricter than it now is.

S. 430 Would Injure Consumers

Even if the present per se rule against resale price maintenance is thought desirable, the proposed conspiracy standard in S.430 may be injurious to consumers in two ways.[4] First, it would permit a jury to infer a conspiracy from potentially procompetitive communications. Second, it would provide an incentive for manufacturers to adopt methods of distribution that may not be the most efficient. In particular, the proposed bill may tend to create uncertainty that may discourage the use of efficient and lawful vertical non-price restraints.

Our first concern can be illustrated with an example. Suppose a ski manufacturer questions one of its dealers about the dealer's declining sales. The dealer responds:

> We have a problem with dealers who sell the equipment without seeing that it fits the customer or instructing the customer on how to use it. In this business, if you don't give proper fitting or instructions the customer might break a leg. Then you or I can be sued. Another problem is the customer who comes in and finds out what equipment is best, receives instructions on its use, then buys from unauthorized dealer X who is able to undersell us because he obtained the goods from a transshipper and neither promotes nor

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[4] S.430 is very similar to S.1445, "The Retail Competition Enforcement Act of 1985." The Commission opposed S.1445 in a letter dated February 11, 1986, to the Honorable Strom Thurmond, Chairman, Senate Committee on the Judiciary.

> stands behind the product. Providing service costs me money. Dealers who don't provide services can undercut me because they don't have to hire the number of trained salespersons necessary to give customers personal attention.
>
> Here's what you should do. If you want to improve your sales and my sales, try upgrading the image of this product. You should find and maintain only those dealerships that provide good service and show this off as a first-class, high-quality product. You should also find and maintain only those dealerships that will not transship to unauthorized dealers outside of their designated selling areas.

At this point, the manufacturer wishes the dealer luck and walks away. Several weeks later, after deciding for himself that the dealer's suggestions had a great deal of merit, the manufacturer terminates a number of discounting dealers, including dealer X, that either were not providing services or were transshipping into other dealers' territories.

Under the proposed legislation, the above conversation, coupled with the manufacturer's decision to terminate some dealers, would permit an inference of conspiracy. Yet, the conversation appears to be procompetitive. The dealer is providing the manufacturer with important information about certain facts of retailing -- it costs money to provide valuable services, and service-oriented dealers need sales and profit margins sufficient to provide those services and hire trained sales personnel.[5] Moreover, the dealer is suggesting a marketing

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[5] The same considerations may apply to any number of dealer investments that help create demand for brand name products. For (continued...)

strategy that might be effective in boosting sales. The dealer also notes that if these services are not provided, the dealer and the manufacturer may increase their risk of tort liability. In this example, it might make sense for the manufacturer to protect his service-oriented dealers, and to minimize his own product liability risk, by terminating discount dealers that either do not provide services or transship products to other dealers that provide no services.

This example illustrates that manufacturers and resellers may have legitimate reasons to exchange information, not only about price, but also about the reception of products in the market. Dealers are an important source of information for manufacturers. As the Court noted in Monsanto, one important type of information is simply how best "to assure that their product will reach the consumer persuasively and efficiently."[6] The Court also noted that manufacturers have a legitimate interest in ensuring that their distributors earn sufficient

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[5](...continued)
example, in apparel or cosmetics the type of outlets that carry the products and the image they convey to consumers may be very important to brand name suppliers whose sales depend critically upon consumers' acceptance of the products. Department stores, for example, may convey a quality or fashion message to consumers and, thereby, a service to the manufacturer just by carrying a product. Quality-certification services, like other services, are costly to dealers, and the services are also subject to free riding by dealers who have not made similar investments and who are thereby able to offer lower prices. See, for example, Report of the FTC on Resale Price Maintenance, Parts I and II (1929), and for a more recent treatment, see Marvel and McCafferty, "Resale Price Maintenance and Quality Certification," 15 Rand Journal of Economics 346 (1984).

[6] 104 S. Ct. at 1470.

profit to pay for promotional programs, such as hiring and training additional salesmen, or demonstrating the technical features of a product. To ensure this, the manufacturer may need to prevent interference from "free riders".[7] Communications from dealers that convey important and competitive information to manufacturers should be encouraged, rather than characterized as a partial basis for an inference of conspiracy.[8]

Our second concern about the proposed legislation is that it could make distribution less efficient and lead to an artificial decline in certain forms of retailing. Facing the threat of treble damages liability for procompetitive conduct and uncertain whether they can legally terminate a dealer, some manufacturers may decide to distribute their products themselves. This probably would be less efficient. Manufacturers presumably now sell predominantly through independent dealers because that is the most cost effective form of distribution. The legal impediment that would be created by this legislation could drive

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[7] The fact that there may be substitute methods of achieving similar results does not necessarily eliminate the harm from a strict per se rule of illegality. If the substitutes are legal but the manufacturer would prefer to use a vertical price restraint if given the choice, an inefficiency may result when the legal prohibition forces the manufacturer to pursue a legitimate objective with a less desirable and, in the manufacturer's view, less effective alternative.

[8] The Commission recently endorsed these principles in an order granting a petition to modify a consent agreement filed by Salomon/North America, a skiing equipment manufacturer (Salomon/North America, Inc., C-2859, July 30, 1985, modifying 89 FTC 24 (1977)). See Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence (FTC Staff Report 1983) at 13-62 for an explanation of various anticompetitive and procompetitive rationales for imposing vertical price restraints.

manufacturers to less efficient means of distribution, with the ironic effect of hurting the dealers it purports to protect. For example, in addition to the possibility of direct distribution, manufacturers may elect to refuse to sell to discounters and to sell only to full-service dealers, in order to avoid the risk that communications with full-service dealers might give rise to antitrust liability. Manufacturers who cannot protect well-known, effective, full-service dealers from free riding by discounters are likely to lose those dealers to store or house brands. Finally, some manufacturers might become overly cautious about the use of efficient, non-price vertical restraints, even though they might be legal under the rule of reason, because such vertical restraints typically have some incidental effect on price.

S. 430 Would Overturn Monsanto and the Basic Elements of Conspiracy Law

S.430 is apparently intended to overrule the conspiracy standard the Supreme Court reaffirmed in Monsanto. I believe this would be unwise. The Court held in Monsanto that in distributor-termination cases

> there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious

commitment to a common scheme designed to achieve an unlawful objective.[9]

The Court's approach to defining conspiracy in Monsanto is consistent with a long line of well-reasoned federal court cases. In one of its first efforts to address the elements that constitute an agreement under Section 1 of the Sherman Act, the Court indicated that the alleged conspirators must know that concerted action is contemplated or invited, and they must have given "their adherence to the scheme and participated in it."[10] The Court subsequently held that establishing the existence of an unlawful agreement requires a showing that the defendants have "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement."[11] On the basis of these and other authorities, lower courts in recent cases have generally taken the position that "[t]he substantive law of trade conspiracies requires some consciousness of commitment to a common scheme."[12]

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[9] 104 S. Ct. 1473.

[10] Interstate Circuit, Inc. v. U.S., 306 U.S. 208, 226 (1939); accord, e.g. U.S. v. Paramont Pictures, Inc., 334 U.S. 131, 142 (1948); In re Plywood Antitrust Litigation, 655 F.2d 627, 634 (5th Cir. 1981), cert. dismissed, 462 U.S. 1125 (1983); Gainesville Utilities Dep't v. Florida Power & Light Co., 573 F.2d 292, 300 (5th Cir.), cert. denied, 439 U.S. 966 (1978).

[11] American Tobacco Co. v. U.S., 328 U.S. 781, 810 (1946).

[12] U.S. v. Standard Oil Co., 316 F.2d 884,890 (7th Cir. 1963); accord, e.g., Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3rd Cir. 1980); Klein v. American Luggage Works, Inc., 323 F.2d 787, 791 (3rd Cir. 1963); Virginia Academy of Clinical Psychologists v. Blue Shield, 469 F. Supp. 552, 559 (E.D. Va. 1979); Duplan Corp. v. Deering Milliken, Inc., (continued...)

The proposed legislation is inconsistent with the basic elements of conspiracy law. The Monsanto Court said that there must be a conscious commitment to a common scheme designed to achieve an unlawful objective, i.e., circumstances must reveal a unity of purpose, or a common design and understanding, or a meeting of minds, in an unlawful arrangement.[13] These oft-repeated legal formulations show that conspiracy has two elements: a meeting of minds and an unlawful purpose. Under S.430, neither element would have to be present for an inference of conspiracy.

The potential adverse effect of the proposed statute can be illustrated by considering the example discussed above, in which the ski equipment manufacturer does not respond to the dealer, but later, after deciding for himself that the first dealer had been right, terminates certain dealers.[14] In that example, there is no apparent meeting of the minds and hence no conspiracy. The complaining dealer probably would be very surprised to learn that it had "conspired" with the manufacturer, rather than that it had simply communicated valuable information. In addition, there is

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[12](...continued)
444 F. Supp. 648, 691 (D.S.C. 1977); Harlem River Consumers Coop. v. Associated Grocers of Harlem, 408 F. Supp. 1251, 1268-69 (S.D.N.Y. 1976); U.S. v. General Motors Corp., 1974-2 Trade Cas. (CCH) Par. 75,253, at 97,670 (E.D. Mich. 1974).

[13] 104 S. Ct. at 1471.

[14] S.430 offers no guidance on how long an inference of conspiracy could be drawn from the described communications. It might permit a court to draw the inference even when years had passed between the conversations and the terminations.

no evidence of unlawful purpose. The manufacturer in the example simply decided unilaterally to renew contracts only with those dealers who would provide services desired by the manufacturer and who would accept a non-price contractual restriction on transshipment. This conduct, judged under the rule of reason, could be entirely lawful and procompetitive.[15]

S.430 Might Permit Private Actions Under The Federal Trade Commission Act

Finally, the language of S.430 seems to contemplate that private civil actions may be brought under the Federal Trade Commission Act. No private cause of action now exists under the Act. We would oppose such a private cause of action.

Conclusion

In sum, we strongly oppose enactment of S.430. It would tend to chill procompetitive communications and business

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[15] The overall meaning of S.430 is so ambiguous that it could be interpreted to overturn the longstanding Colgate doctrine, which permits a manufacturer's unilateral announcement of suggested resale prices and its refusal to deal with those who do not comply. U.S. v. Colgate & Co., 250 U.S. 300,307 (1919). The Eighth Circuit rejected an attempt by the FTC to overturn Colgate in Russell Stover Candies, Inc. v. FTC, 718 F.2d 256 (8th Cir. 1983). The Supreme Court strongly embraced the Colgate doctrine in Monsanto: "If an inference of [a price-fixing] agreement may be drawn from highly ambiguous evidence, there is considerable danger that the doctrines enunciated in Sylvania and Colgate will be seriously eroded." 104 S. Ct. at 1470. We are also troubled by the possibility that the language of S.430 may overturn Sylvania and reinstitute the per se illegality rule of Schwinn. Serious anticompetitive consequences would follow if that were to happen. The economic rationale behind Sylvania for non-price vertical restraints is sound. By contrast, the Schwinn rule was short lived because it clearly interfered with procompetitive business decisions.

practices, and would distort conspiracy law in a wholly undesirable fashion. I would be happy to answer any questions you may have.

Senator METZENBAUM. Mr. Oliver, what was the vote of the Commission? You said you were speaking on behalf of a majority of the Commission.

Mr. OLIVER. It was 3-2, I believe.

Senator METZENBAUM. 3-2?

Mr. OLIVER. I believe so.

Senator METZENBAUM. When did that action occur?

Mr. OLIVER. That action occurred within the last 2 or 3 days. I do not remember, either yesterday or the day before, I believe.

Senator METZENBAUM. Mr. Oliver, we had some figures prepared indicating the difference in price that discounters and the regular full-price stores. With respect to clothes, the discount was about 30 percent; with respect to electronics, the discount was around 22 percent; with respect to toy discounts, it was around 18 percent.

I have difficulty in understanding you when you say that this bill will hurt consumers. Now, all the consumer groups in this country, some of whom have testified and other ones which have sent in letters, all support the legislation and I want to know what your evidence or how you arrive at the conclusion that a discounter such as Burlington and the other gentleman who was here representing K Mart, but he was speaking on behalf of the National Mass Retailing Institute, how you can conclude (a) that it will hurt consumers, and that it will hurt the discounters as well, when their testimony is all to the contrary. Where do you get any support for your position?

Mr. OLIVER. Senator, let me say first, if I may, that I think that price is not the only thing that consumers are interested in, although it is certainly the most obvious thing—the most obvious aspect of the transaction they tend to focus on. So if you offer them a lower price, they tend to think that that is certainly the best possible——

Senator METZENBAUM. You were not here and I want to be fair to you. I showed these two shirts. They are absolutely identical. I challenge you to find any distinction in one or the other. One is $10 and one is $6.75 at the discounter. I put into the record the study that my own staff did in Ohio comparing prices not of non-comparable materials but comparable materials, in other words brand-name products, and found that in place after place after place—and I urge upon you that you look at it.

As a matter of fact it goes one better than that. I urge you to take it home and show it to your wife and ask her how she feels about this bill. My guess is I can convince your wife to be on our side on this bill and maybe she can prevail upon you. Even if I cannot, the fact is the evidence is replete that the discounters are selling the identical product at a lower price, and what we are concerned about is this pressure that manufacturers put on them to cause them to quit discounting or to withdraw their products from them.

Mr. OLIVER. Senator, first of all, let me say that it probably is improper for me to try to make money on inside information, but as regards my wife, I will bet you $1,000. [Laughter.]

Maybe that should be off the record.

Senator METZENBAUM. Take it home and ask her. You have got too much confidence in her, but I have confidence in her intellectu-

al abilities and you have confidence in her fidelity to your——
[Laughter.]

Mr. OLIVER. If you will come to dinner at my house, I would be happy to let you argue with her about the bill.

Senator METZENBAUM. Okay. Fine. All right. Go right ahead.

Mr. OLIVER. Where were we? First of all, on price, I think while price tends to be the aspect of a transaction that a consumer most likely focuses on because it is so visible, there are also other aspects of a transaction that are important but less visible or less focused on, and one is the providing of information. If you go to buy a new piece of electronic equipment, that is also something in addition to the price that is valuable to the consumer. To the extent that you do not have retail maintenance, you tend to discourage the providing of that kind of information to consumers and that seems to me will not be beneficial to consumers. They profit from information that they can get in the marketplace regarding certain prices. By making retail price maintenance more difficult, I think you will tend to make the providing of that information less prevalent.

Senator METZENBAUM. What advice is this? I am not quite clear.

Mr. OLIVER. Information. I mean that there will be less information about how to use a new piece of electronic equipment. That is information that the consumer gets, but if the dealer does not have some incentive to produce that information, it is likely that he will not produce it and the consumer will not receive it.

Senator METZENBAUM. As a matter of fact, I know some stores that are discounters that have whole departments that you can pick up the phone and call and they will send some people out to help you with the product. In fact, they are much better equipped in many instances than is the small local retailer or the department store. And we had some testimony from some women here this morning who made it very clear that they were very pleased with the kind of service they got, the kind of sales people that they deal with, and the overall cooperation of discount stores.

When you are buying a suit from somebody like Burlington you certainly do not need any service on that, you do your own tailoring. If you want tailoring in many retail stores today, you pay extra for that tailoring anyhow—I do not know what people like Burlington do.

Mr. OLIVER. I suspect it is true that retail price maintenance would not be useful and is probably not used in all products or certainly by all manufacturers. It seems to me that is not the point. The point would be that in some instances retail pricing would be useful and with the two items you show there it might not be useful.

Senator METZENBAUM. Mr. Oliver, you may be able to prevail upon your wife to be on your side, but I have got somebody on my side and I just wanted you to reconcile for me the position of the FTC in view of the fact that Ronald Reagan stated in 1975, in talking about legalized sale price maintenance, which as you know is called fair trade, he said the following:

"It used to be argued that fair trade laws help small retailers"—that sounds like you—"from being severely undercut by big chains with superior buying power. It is more likely that independent

neighborhood retailers are surviving today because they are convenient. In an age when advertising has effectively presold so many brand names, is the retailer really providing any extra useful service to the consumer in exchange for that higher profit margin. It is nice to know that he carries a broad selection, but without fair trade wouldn't an enterprising merchant carry as broad a line as his customers demand? Let's rethink the fair trade laws altogether, eliminate them and some prices should begin going down as a result of that."

Is President Reagan wrong?

Mr. OLIVER. Senator, my understanding is that the fair trade laws were different from the state of the law that we have now involving resale price maintenance. Fair trade laws allowed, for example, dealers to enforce resale price maintenance kind of contract against other dealers. That is certainly not the case now.

The Miller-Tydings Act, I believe, was passed at the behest of the retail druggists as a special interest law designed to allow certain dealers to enforce retail price contracts against other dealers and manufacturers, so I think the situation was different then.

Senator METZENBAUM. Resale price maintenance and fair trade laws all involve vertical price fixing, and you can say that they are different but the fact is the bottom line is they both involve price fixing and manufacturer to the distributor, to the dealer, and the President has disavowed any support for fair trade laws, which means vertical price fixing.

I really have difficulty in understanding how the FTC can come forward and oppose the legislation which I have submitted.

Let me ask you another question. The Supreme Court invited the Solicitor General to file a brief in a retail price maintenance case called *Business Electronics* v. *Sharp*. Did either the FTC or the Department of Justice prepare a draft brief concerning that case?

Mr. OLIVER. Senator, I do not know the answer to that question. I was not at the FTC then, but I can find out for you.

Senator METZENBAUM. If you would, and if you would not only find out but tell us what the draft brief stated, furnish us with a copy of it.

I think some of the members may have some additional questions. If they do, I am certain you will be cooperative, as you have in the past, and be good enough to answer those after the hearing.

Mr. OLIVER. I would be happy to respond.

Senator METZENBAUM. Senator Thurmond has a statement which he would like to have included in the record, and it will be immediately after the Chairman's initial opening statement.

Thank you very much.

Mr. OLIVER. Thank you.

Senator METZENBAUM. The subcommittee is adjourned.

[Whereupon, at 12:05 p.m., the subcommittee was adjourned.]

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APPENDIX

STATEMENT OF

CHARLES F. RULE
ACTING ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

SUBMITTED TO

THE

SUBCOMMITTEE ON ANTITRUST, MONOPOLY AND BUSINESS RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

S. 430

A BILL TO AMEND THE SHERMAN ACT
REGARDING RETAIL COMPETITION

ON

APRIL 23, 1987

The Department of Justice appreciates the opportunity to submit its views on S. 430 to the Subcommittee. Entitled "a bill to amend the Sherman Act regarding retail competition," S. 430 actually focuses on only one particular practice that may or may not directly affect competition at the retail level--resale price maintenance. S. 430 would: (1) define certain agreements between sellers and purchasers of goods or services regarding the price at which purchasers resell such goods or services as "sufficient to establish" violations of the Sherman Act, and (2) set out new presumptive evidentiary standards for judges and juries to follow in determining whether a seller and a purchaser actually have entered into such an agreement.

For many reasons, the Department of Justice strongly recommends against enactment of this legislation. I would emphasize at the outset of this statement, however, that the Department's opposition to S. 430 is only in part attributable to its view that resale price maintenance is not always competitively harmful. By far our greater concern with the establishment of a statutory per se rule against resale price maintenance agreements stems from the fact that attempts to define per se Sherman Act violations through particularized statutory language are at odds with the flexibility and utility that Congress wisely imparted to that Act by declaring its

prohibitions in only the most general of terms. Any standard for antitrust liability not explicitly pegged to adverse effects on competition is particularly susceptible to producing at best confusion and, more likely, untoward results. In addition, all of the perverse results from such an unprecedented codification of a per se rule of illegality cannot be forseen.

Similarly, we believe that statutory standards regarding whether, when, or with what assurance judges and juries may or must infer the existence of any particular kind of agreement (in this case, a resale price maintenance agreement), no matter how artfully drafted, will inevitably confuse and may well conflict with the careful development of the common law of conspiracy in the antitrust setting that the courts have been about since 1890.

RESALE PRICE MAINTENANCE UNDER THE ANTITRUST LAWS

First, let me provide a bit of background. Resale price maintenance, and by that term I mean the insistence by a seller (e.g., a manufacturer) that purchasers of its products (e.g., dealers) resell that product only at prices set by the seller, has long been the focus of inquiry under the antitrust laws. The typical claim has been that insistence by a manufacturer that its dealers keep their resale prices above certain minimum

levels inhibits intrabrand price competition that would otherwise drive prices down. In the Dr. Miles case in 1911, 1/ the Supreme Court held that a manufacturer may not enter into agreements with its dealers to set resale prices. Less than ten years later, however, the Court held in Colgate 2/ that a manufacturer may exercise "independent discretion" in choosing its dealers, even to the point of announcing desired resale prices and refusing to resupply dealers who have failed to adhere to those prices.

The significance of the early Dr. Miles and Colgate decisions was limited for about 40 years by federal and state statutes specifically related to resale price maintenance. During the Depression concern developed in Congress that small retail businesses might suffer in competition with larger and possibly more efficient retailers, 3/ and that practices such as the use of well-known brands as loss leaders diminished the goodwill value of trademarks. To ameliorate these problems, Congress enacted the Miller-Tydings "fair trade" amendment 4/

1/ Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

2/ United States v. Colgate & Co., 250 U.S. 300 (1919).

3/ See, e.g., L. Brandeis, The Curse of Bigness (1934), cited in ABA Antitrust Section, Antitrust Developments 1955-1968 111 n.6 (1968).

4/ 50 Stat. 693 (1937).

to the Sherman Act permitting certain resale price maintenance agreements where authorized by state law. As a result, manufacturers could protect their dealers' profit margins and prevent discounting of branded products. The Miller-Tydings Amendment was effectively expanded in 1952 by the McGuire Amendment to the FTC Act, 5/ which permitted states to allow manufacturers to enforce certain resale price agreements even against nonsigning dealers as long as the nonsigners had notice of the existence of a resale price agreement between the manufacturer and another dealer in the same state. 6/ At one time forty-six states had fair trade laws. 7/

With the stated intention of promoting competition in distribution and encouraging lower retail prices, Congress reversed its field and repealed the Miller-Tydings and McGuire Amendments in 1975. 8/ Since then the Dr. Miles and Colgate

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5/ 66 Stat. 632 (1952).

6/ The McGuire Act reversed Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), which voided on supremacy clause grounds a state statute permitting a manufacturer to enforce a resale price agreement against a nonsigning dealer.

7/ ABA Antitrust Section, Antitrust Law Developments (Second) 56 n.383 (2d ed. 1984). In five of these states, the fair trade laws were later declared unconstitutional by the state supreme courts. Statutes binding nonsigners were found unconstitutional in many states. Id.

8/ The Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975). Repeal was effective as of March 12, 1976.

decisions have governed the resale price maintenance efforts of manufacturers in the United States. Most recently, in its Monsanto decision, 9/ the Supreme Court upheld a treble damage award based on resale price maintenance, declining to reconsider the per se unlawful status of such agreements.

In sum, while opinions on the likely competitive merits and demerits of resale price maintenance have differed over the years, currently resale price maintenance agreements are "per se" violations of the Sherman Act. As distinguished from agreements with dealers regarding resale prices, however, unilateral insistence by a manufacturer that dealers adhere to its desired resale prices, even as enforced through the manufacturer's refusal to continue to sell its product to non-complying dealers, is not an antitrust violation at all. 10/

9/ Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

10/ Unless, of course, the unilateral action is part of an effort by the manufacturer unlawfully to create or maintain a monopoly. This exception was recognized in Colgate itself, 250 U.S. at 307.

THE DEPARTMENT'S VIEWS AND CURRENT POSITION
WITH RESPECT TO RESALE PRICE MAINTENANCE AGREEMENTS

The Department of Justice filed a brief as amicus curiae in the Monsanto case expressing serious doubts as to the continued legitimacy of the current per se rule. We invited the Supreme Court to reexamine the rule, urging that resale price maintenance usually will not be used by a manufacturer simply to increase the retail price of its product, since it can do that more directly by raising its wholesale price. Rather, resale price maintenance usually will be designed to promote interbrand competition by encouraging dealers, inter alia, to train sellers, to undertake effective sales promotions, to create attractive showrooms, and to support informational, maintenance or repair services. Resale price maintenance curtails "free rider" dealers, who sell at discount prices to customers attracted to a product by other dealers' advertising or other promotional activities and who thus thwart procompetitive efforts desired by the manufacturer. Economists have posited several other procompetitive explanations of resale price maintenance as well. 11/

11/ See, e.g., Telser, Why Should Manufacturers Want Fair Trade?, III J. Law and Econ. 86 (1960); Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence, Bur. Econ. Staff Report to the FTC, Nov. 1983; Marvel and McCafferty, The Political Economy of Resale Price Maintenance, 94 J. Pol. Econ. 1074 (1986).

The Department's arguments did not persuade the Court to reconsider the per se rule, however. Since the Court's decision, the Department has made clear that it will enforce the law as it stands.

I would be less that candid with the Subcommittee if I did not make clear that, notwithstanding our commitment to enforce resale price maintenance per se precedent, the Department's continuing misgivings about the current rule are one reason why we oppose S. 430. For the reasons articulated in our Monsanto brief, we view resale price maintenance agreements as potentially procompetitive--not just competitively neutral--in many circumstances. I hope the Congress will consider the possible merits of resale price maintenance as it considers this legislation. Indeed, such objective consideration may well convince you to override statutorily the current per se status of resale price maintenance. Regardless, however, of one's view of the competitive merits of resale price maintenance, either through agreements with dealers or unilateral action by manufacturers, legislation along the lines of S. 430 is both unnecessary and unwise.

CODIFICATION OF A PER SE RULE

S. 430 provides that an agreement between a seller and a purchaser to establish the resale price of a good or service

"shall be sufficient to establish" a violation of the Sherman Act. The apparent purpose of this provision is to codify prevailing precedent that resale price maintenance agreements are per se violations of that Act; whether its effect would be to do so is far less clear. In any event, the statutory delineation of specific conduct as violative of the antitrust laws, without regard to its competitive effect, would be a disturbing and, we believe, very risky departure from the kinds of antitrust statutes that have served us so well for nearly a century.

The General Nature of the Antitrust Statutes

Our principal antitrust statutes were purposefully drawn in broad, general terms. 12/ The Sherman Act proscribes "[e]very contract, combination . . . , or conspiracy in restraint of trade or commerce . . .," as well as monopolization or attempts or conspiracies to monopolize any part of trade or commerce. This statutory generality, keyed to competitive effect, has facilitated effective antitrust enforcement over the years, leaving room for prosecutorial and judicial extension or correction of antitrust precedent as warranted. As a result, over almost 100 years now, the law has evolved according to

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12/ See, e.g., Northern Pacific R. Co. v. United States, 356 U.S. 1, 4-5 (1958) (the antitrust laws comprise a "comprehensive charter of economic liberty").

changing economic conditions and to better understanding of the competitive purposes and effects of particular types of agreements. 13/

When the Sherman Act was supplemented in 1914 by the FTC Act and the Clayton Act, Congress again by-and-large wisely chose to describe those practices with which it was concerned only in general terms, and most importantly to peg violations to adverse effects on competition. Like the Sherman Act, section 3 of the Clayton Act, relating to sales conditioned on the buyer's agreement not to deal with the seller's competitors, 14/ section 7 of the Clayton Act, relating to stock acquisitions, 15/ and section 5 of the FTC Act, covering unfair methods of competition, 16/ all were premised on the competitive effects of conduct that might be challenged. 17/

13/ For example, see the discussion of tying arrangements and non-price vertical restraints, infra, at pp. 14-16.

14/ 15 U.S.C. § 14.

15/ 15 U.S.C. § 18.

16/ 15 U.S.C. § 45.

17/ In contrast, section 8 of the Clayton Act (15 U.S.C. § 19) establishes a per se prohibition on interlocking directorates among competitors, unrelated to a likelihood of anticompetitive effects. Hearings before the Committee on the Judiciary during the 99th Congress disclosed perverse effects currently being caused by the per se rule in section 8, and proposed legislation to ameliorate these effects enjoys wide support.

The wisdom of such generality is obvious--no Congress, no matter how prescient, can anticipate the infinite variety of factual contexts in which commercial agreements occur, and statutorily distinguish, case-by-case, those that harm competition from those that do not. Predicating antitrust prohibitions on anticompetitive effects, on the other hand, covers no more and no less than the entire public interest competitive waterfront.

The Development of and Utility of
Judicially Recognized Per Se Rules

It is axiomatic that the antitrust statutes should prohibit only those agreements and practices that unreasonably restrain competition. Over the years, however, the courts have developed so-called "per se" antitrust rules to avoid unnecessary inquiry into the effects of certain agreements that consistently were shown to have obvious anticompetitive effects and little if any procompetitive benefits. These rules are invoked "when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." 18/ The basis of every per se rule is a demonstrated adverse effect on competition--the same standard set forth in the antitrust

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18/ National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 103-04 (1984).

statutes themselves. Carefully developed, managed and applied, per se rules can be useful--in some cases, essential--evidentiary short-cuts.

The first per se antitrust rule condemned horizontal minimum price-fixing. It was outlined in the Joint Traffic case in 1897 19/ and firmly established in Trenton Potteries. 20/ Other per se rules were formulated as judicial experience with various business practices grew. Horizontal market allocation, group boycotts, certain tying arrangements, and, of course, resale price maintenance agreements are the subjects of the other major per se rules in effect today.

Per se rules have evolved slowly to flesh out the general terms of the antitrust statutes and facilitate their enforcement. They have been developed in the best common law tradition. Concrete factual circumstances arising in the real world have helped courts mold clear and practical rules. Careful analysis in a series of cases has assisted courts in evaluating the competitive consequences of challenged conduct. Because the rules are effect-oriented, they can be and have

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19/ United States v. Joint Traffic Ass'n, 166 U.S. 290 (1897).

20/ United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

been expanded and contracted as appropriate to proscribe anticompetitive activity while permitting procompetitive activity. The per se rules we use today are valuable tools--strong, yet adjustable--of antitrust understanding and enforcement.

Judicial Development and Management of the Per Se Rule Against Resale Price Maintenance Agreements

Resale price maintenance agreements have a long history in the antitrust courts. As I noted at the outset of my statement, in Dr. Miles Medical Co. the Supreme Court early held that a manufacturer may not agree with its dealers on minimum resale prices. Soon thereafter, however, in Colgate, the Court was called upon to make clear that only resale price maintenance agreements violate the Sherman Act, and that a manufacturer acting unilaterally may set resale prices and enforce adherence to those prices by terminating non-complying dealers. Subsequently, the courts have had frequent occasion to consider such questions as the legitimacy of consignment plans, in which the manufacturer retains title and other indicia of ownership of goods and unilaterally determines the price at which they shall be sold, 21/ and agreements establishing maximum, as opposed to minimum, resale

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21/ See, e.g., United States v. General Electric Co., 272 U.S. 476 (1926); Simpson v. Union Oil Co., 377 U.S. 13 (1964).

prices. 22/ A very substantial body of case law comprises the per se rule against resale price maintenance agreements.

The Dangers of Codifying Per Se Rules as Compared to the Benefits of Flexible Standards

Attempting to codify a rule against resale price maintenance agreements would be an unnecessary and unfortunate departure from years of antitrust tradition. Statutory language that is oblivious to competitive effects in particular is virtually certain to produce aberrant results--liability where no competitive harm has been done, and perhaps even exoneration where competitive injury is substantial. Per se rules, as useful as they have been in antitrust jurisprudence, are simply not susceptible to codification.

The dangers of setting per se rules in statutory stone are clearly revealed by the continuing care they have required in the courts. For example, although the per se rule against horizontal price fixing is universally endorsed, its literal application in an important case temporarily produced the wrong result. In Broadcast Music, 23/ the courts confronted an arrangement through which music composers and publishers sold "blanket" licenses for performance of any or all of their

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22/ See Albrecht v. Herald Co., 390 U.S. 145 (1968).

23/ Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

works. From one viewpoint, adopted by the Second Circuit panel, the per se rule against horizontal price-fixing seemed to apply. At the same time, however, blanket licenses offered significant potential integrative efficiencies in the marketing of musical composition performance rights. In reviewing the circuit court's per se holding, the Supreme Court observed that applying per se rules is not always a "simple matter," 24/ and concluded that the blanket licenses should be evaluated under the rule of reason. Had a statutory per se rule against horizontal price fixing been in effect, outlawing "price fixing among competitors" without regard to actual competitive effect, the sensible result reached by the Court in Broadcast Music could well have been foreclosed.

The per se rule against tie-ins also has required close attention from time to time, particularly with respect to the nature and application of its essential elements in varying factual contexts. The rule outlaws arrangements in which the sale of one product is conditioned on the purchase of another, but is only applicable where, among other criteria, the seller possesses market power in the market for the so-called "tying product." The issues whether a seller was offering essentially one product or tying two separate products together and whether

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24/ Id. at 9.

the seller possessed the requisite market power were intertwined in the recent Jefferson Parish case. 25/ Free from the constraints of any formalistic statutory language, the Supreme Court in that case was able to examine the effects of the challenged arrangement, evaluate it on the basis of whether it caused any type of competitive harm, and recognize it as a legitimate exclusive dealing contract rather than a tying arrangement that was illegal per se.

Perhaps the best and most pertinent example of the need to keep per se rules flexible is the antitrust history of non-price vertical restraints. The Supreme Court first addressed the antitrust status of such restraints in White Motor Co., 26/ which required them to be evaluated under a rule of reason. Only four years later, however, in the Schwinn case, 27/ the Court formulated a per se rule against agreements by manufacturers and dealers that limited dealers' rights to sell outside their assigned territories and to sell to unfranchised dealers. After 10 years of confusion as to the scope of the rule and debate as to its wisdom, the Court

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25/ Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984).

26/ White Motor Co. v. United States, 372 U.S. 253 (1963).

27/ United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

overruled Schwinn, holding that the possible procompetitive aspects of such agreements required a rule of reason analysis of non-price vertical restraints. 28/ It concluded that a per se rule that did not focus on the competitive effects of such conduct would produce incorrect results in some cases. In the words of the Court, any per se rule should be "based on demonstrable economic effect rather than . . . upon formalistic line drawing." 29/ The White Motor-Schwinn-Sylvania history illustrates the need for the courts to be able to modify as well as interpret and apply per se rules correctly when fact and economic theory are compelling.

Situations like those in Broadcast Music, Jefferson Parish and GTE-Sylvania were not unanticipated when the antitrust laws were first put in place. The drafters of the Sherman Act recognized that only the broadest statutory guidance should be given, to be amplified and explained through individual cases. Senator Sherman himself noted that

> . . . it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do, is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the

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28/ Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

29/ Id. at 58-59.

courts of England and the United States have done for centuries. 30/

Unlike the generalized statuory language that we have used to date in antitrust, precise and conclusory statutory antitrust rules not expressly based on competitive effect would lack the flexibility necessary for optimum enforcement. Under a detailed statute such as S. 430, antitrust inquiry would focus on the meaning of particular words and phrases, and on obscure and possibly inconsistent legislative history. Analysis of competitive effects would be, if relevant at all, secondary. Where the statute's particularized language turns out to be overinclusive, it would condemn behavior that should not be prohibited. Where underinclusive, it would open inappropriate loopholes. And when problems were recognized, legislative correction could be a slow and difficult process, often resulting in new legislation with still more terms to interpret. Industry-specific statutory antitrust exemptions--the proposed Malt Beverage Act, for example--provide good examples of the risks inherent in a particularized statutory approach to antitrust law unbridled by consideration of effects on competition. Thus assistant attorneys general as diverse as Thurmond Arnold and William

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30/ 21 Cong. Rec. 2460 (1890), cited in 1 The Legislative History of the Federal Antitrust Laws and Related Statutes 19 (E. Kintner, ed. 1978).

Baxter have advocated the careful development of antitrust principles through case law. 31/

S. 430 As Illustrative of the Problems Inherent in Codifying a Per Se Rule

S. 430 itself demonstrates the pitfalls of trying to legislate a per se rule against resale price maintenance agreements. Several problems are apparent on the face of the bill:

- The bill covers all civil actions "based on" sections 1 and 3 of the Sherman Act. In section 2 cases, would the "reasonableness" of resale price maintenance agreements be a legitimate defense?

- The bill bars agreements to "set, change, or maintain" a price level, terms that are used in price fixing case law. But such cases use many other terms as well. Is there any significance to the omission of other terms? What is meant by the bill's term "price level"? A floor? A ceiling? A specific price?

31/ T. Arnold et al., The Sherman Act and its Enforcement 14-15 (1940); Baxter, The Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law, 60 Tex. L. Rev. 661, 667-68 (1982).

- What would the effect of the bill be on arrangements between manufacturers and dealers that affect price but leave dealers some discretion as to the bottom line, for example, arrangements between manufacturers and dealers to share the cost of discount or other promotional schemes?

- The bill's phraseology "sufficient to establish" a violation has no precise meaning in law. Does the bill merely describe prima facie proof sufficient to protect the plaintiff from a directed verdict at the close of his direct case, or does "sufficient to establish" mean that no defense is allowed?

- How would the bill affect other types of price-fixing cases and non-price vertical cases? The intent of Congress with respect to such cases could be a matter of speculation in the courts, with unpredictable results. Anomolous results are certainly possible: for example, the law governing vertical price arrangements under the bill could develop more strictly than the law on horizontal price arrangements involving direct competitors. 32/

32/ See Broadcast Music, supra.

Further refinements in drafting, of course, might address some of these problems. However many probably could not be satisfactorily resolved, and other unrecognized problems likely would crop up, requiring slow resolution through judicial analysis and application of the legislation. Inflexible legislative language might confound rational solutions to such problems. In short, S. 430 could well obscure the law on resale price maintenance rather than clarify it.

By far the better approach is continued reliance on precedential development of antitrust law, including the treatment of resale price maintenance, in the common law tradition. Sound antitrust rules simply are not amenable to fixed, detailed, abstract articulation. While not every court decision is correct when decided, and not every holding remains persuasive over the years, in the long run the common law process has served antitrust enforcement well. Resort to fixed, detailed and formalistic rules holds no such promise.

CODIFICATION OF AN EVIDENTIARY STANDARD

Let me turn now to the other aspect of S. 430: its provision of a special new evidentiary standard to be used by the courts in determining whether the requisite "agreement" exists in certain resale price maintenance cases. S. 430 provides that a manufacturer's termination of a dealer or

refusal to supply some or all of the goods or services requested by a dealer "in response to" complaints from another dealer about pricing "shall be sufficient to raise the inference" of an illegal resale price maintenance agreement. Apparently because of dissatisfaction with the recent Monsanto opinion and some lower court decisions applying the language in that opinion, S. 430 would, in one area of antitrust law, substitute a few words and phrases for decades of case law on what constitutes challengable concerted action under the antitrust laws.

Legislation along the lines of S. 430 could do great harm. It could lead to erroneous findings on a key factual issue, disturbing irrevocably the careful distinction drawn in the Dr. Miles and Colgate cases between unlawful concerted activities and perfectly legitimate procompetitive unilateral conduct by manufacturers. Simply put, S. 430 would confuse and contort the search for truth in resale price maintenance cases.

The Significance of the Contract, Combination, or Conspiracy Requirement in Antitrust Cases

The concept of agreement is fundamental to antitrust law. Sections 1 and 3 of the Sherman Act outlaw contracts, combinations and conspiracies in restraint of trade. Only section 2 addresses unilateral activity, and it condemns only conduct that threatens to create or maintain a monopoly. This

crucial distinction in the antitrust laws between independent and concerted activity is by no means accidental. The antitrust laws were designed to foster competition, and independent decision-making is at the heart of the competitive process. It would be a serious mistake to begin regulating non-monopolistic unilateral business conduct. Yet S. 430 could do just that.

The common law doctrine of conspiracy is age-old. In enacting the Sherman Act, Congress relied on the common law tradition to give meaning to the terms "contract," "combination" and "conspiracy" and to ensure that no concerted arrangement within the intent of the statute escaped its coverage. 33/ What constitutes an antitrust combination or conspiracy is an issue that always has and continues to receive careful attention and thought in the courts. The result is a clear, practical doctrine that reaches all forms of concerted anticompetitive activity while scrupulously avoiding condemnation of non-monopolistic unilateral activities.

The Supreme Court's reasoning in recently rejecting the so-called intra-enterprise conspiracy doctrine is

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33/ See Standard Oil Co. v. United States, 211 U.S. 1, 59-60 (1911).

illustrative. In Copperweld Corp. v. Independent Tube Corp., 467 U.S. 752 (1984), the Court observed that scrutiny of a single firm's conduct is permitted only when there is a danger of monopolization, because it is sometimes difficult to distinguish robust competition from anticompetitive behavior. The Court also indicated that the antitrust laws should not be used to dampen unilateral competitive zeal except when the most serious antitrust harm is threatened.

Inferring Agreement

Because antitrust conspiracies are not alwasy easy to prove, and even may be of a tacit rather than explicit nature, the courts repeatedly have confronted the evidentiary issue of whether circumstantial evidence of a particular sort should be sufficient to permit the inference of an agreement. In a seminal case in this area, Interstate Circuit, 34/ there was no proof of an explicit agreement, but each company knew that parallel action was contemplated, knew which other companies had been invited to participate, and knew that the cooperation of all was essential to the success of the alleged restraint. Importantly, each company benefited only if all adhered to the common scheme--the conduct would not have been in the interest

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34/ Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

of any single participant acting alone. On this record, the Supreme Court held that an agreement could be inferred. By contrast, in Theatre Enterprises, 35/ a number of companies had engaged in similar behavior, but their conduct was in the individual interest of each, regardless of what course the others chose. There was no direct evidence of agreement, only of independent choices by different companies to adopt the same practices. On that record the Supreme Court upheld a jury verdict finding no conspiracy.

Cases relying on Interstate Circuit or Theatre Enterprises are legion; their common thread is that the infinite variety of facts that attend business conduct must drive the conclusion as to whether an agreement is legitimately inferable on the basis of circumstantial evidence. No one fact is determinative. Given the great importance of the difference between concerted and unilateral activity in antitrust, the significance of this evidentiary truth cannot be overstated.

The law of agreement in resale price maintenance cases has been carefully developed in full accord with these principles. Dr. Miles held that a manufacturer may not contract with its

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35/ Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954).

dealers to fix resale prices. Colgate made clear that a manufacturer may unilaterally announce the resale price policies it wishes its dealers to follow and terminate any dealer that subsequently fails to adhere to those policies. Parke Davis 36/ expounded upon and carefully circumscribed the Colgate doctrine, focusing antitrust attention on all the facts and circumstances surrounding a manufacturer's resale price maintenance efforts. And most recently, in the Monsanto case, which upheld a jury's treble damage award based on sharply conflicting evidence, the Supreme Court correctly applied the law in this area by stating that it is improper to infer a resale price maintenance agreement from the fact that a manufacturer learns of a dealer's unacceptable pricing policy from another dealer. The critical issue is whether the manufacturer's decision was an independent one or was undertaken pursuant to an agreement with someone else. Monsanto is fully consistent with, indeed is compelled by, the previous cases. It is, quite simply, correct.

The Dangers of Attempted Legislative Reversal of Monsanto

S. 430 would do great harm to the careful logic that has guided the development of the law of conspiracy in the resale price maintenance setting. It would also obliterate the

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36/ United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

fundamental distinction that the antitrust laws draw between concerted activity and non-monopolistic unilateral conduct. The legislation would allow some sort of inference or presumption--and I shall return to the understandable ambiguity in the bill in this respect and others in a moment--of an illegal agreement solely on the basis of a totally equivocal fact: the source of a manufacturer's knowledge of dealer's resale pricing policies. In so doing, and notwithstanding the ability of manufacturer-defendants in treble-damage cases to try to prove that there was no agreement, it could destroy the Colgate doctrine and substantially inhibit competition in many affected markets.

Codification of a special evidentary rule in resale price maintenance cases raises essentially the same types of problems presented by codification of a substantive per se rule. New statutory language would inhibit judicial flexibility, divert the parties', the jury's and the court's attention from the real issue whether there was in fact an agreement to peripheral questions of statutory interpretation and legislative history, and interject confusion in cases not covered by the legislation. Not incidentally, it would produce unjust results in many cases. Again, S. 430 itself is evidence of some of the pitfalls:

- Which suits are governed by the bill? By its terms, S. 430 covers any civil action based on section 1 or 3 of the Sherman Act, some of which are government actions, and actions under section 5 of the FTC Act, all of which are government actions. But S. 430 also refers to a discontinued dealer as "the claimant." Would the bill's inference be permitted in criminal cases? In Department of Justice or FTC civil enforcement cases where there was no "claimant"? In section 2 monopolization cases, brought by either private or government plaintiffs?

- What, precisely, is meant by termination "in response to" a communication from another dealer? What if, as would often be the case, a communication from a disgruntled dealer was not a manufacturer's sole source of knowledge of pricing policies to which it objected? What if such a communication was only one of several factors underlying a manufacturer's decision to terminate a discounter? Once having received a complaint from another dealer, would the manufacturer be disabled from ever terminating a discounter, no matter how harmful its conduct might be to the marketing of the manufacturer's products?

- What is meant by "sufficient to raise the inference of an illegal agreement"? Is this phrase intended to mean "permit the inference," or "raise the presumption" or something in between? Are courts to deny any defendant's motion for a directed verdict on the agreement issue, no matter what the state of the overall record at the close of the plaintiff's case or after the defendant has presented its side of things, if the plaintiff has adduced some evidence of a communication?

These are just some of the questions that would be raised by legislation that would supplant the traditional common law approach to the concept of agreement with a statutory attempt to define this key concept in the resale price maintenance area. When formulated through judicial precedents, antitrust rules can be developed and adjusted as needed to reach results consistent with the competitive goals of the antitrust laws. When frozen into an abstract statute, specific terms can assume unwarranted importance, to the detriment of the underlying goals of the antitrust laws.

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To summarize, the Department of Justice believes that without regard to the merits of resale price maintenance, legislation along the lines of S. 430 is unwise. It could have serious and unknowable adverse effects in critical areas of antitrust law--the development and application of per se rules and fundamental evidentiary standards. It would be inconsistent with the way we have drawn our antitrust statutes in the past and with a century of common law development of antitrust principles. There is no pressing need for such extraordinary action. Disagreement with a few recent lower court decisions in particular provides insufficient grounds for such damaging inroads on antitrust law. The harm such legislation could inflict is far greater than the harm, if it is harm, that the legislation is intended to undo.

SEPARATE VIEWS

OF

FTC COMMISSIONER

PATRICIA P. BAILEY

Before the

Subcommittee on Monopolies and Commercial Law

Committee on the Judiciary

U.S. Senate

S. 430 THE RETAIL COMPETITION ENFORCEMENT ACT

OF 1987

APRIL 23, 1987

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This hearing illustrates that there are a number of different ideas as to the best way to approach the problem of resale price maintenance. As an FTC Commissioiner, it is my view that it may be less important what legal standard we apply than that we give more than lip service as a return on the taxpayer's dollar. We should, in other words, be vigorously investigating and prosecuting those situations where there is no disagreement as to what may violate the law.

No Member of the Commission disagrees, as far as I am aware, that as judged by the Rule of Reason, there are instances where resale price maintenance is a legitimate concern of law enforcers. There is indeed some disagreement among us as to how much further we might go in defining the resale price maintenance "problem", but we have allocated substantial public monies to the area of distributional restraints for activities where there is no dissent. The question is what are we doing with the resources we have thus committed? I am not sure that the Commission can demonstrate that it has a vigorous, or even minimal program devoted to the investigation of resale price maintenance under any of the various theories applicable to analysis of that violation.

In this testimony, I would like first to highlight a little recent FTC history of the controversy over whether to follow the per se or the Rule of Reason approach to resale price maintenance. Then, second, I will review the recent activities of the Commission in the areas where a consensus exists that resale price maintenance can be a problem.

During my seven years at the Federal Trade Commission there have been major changes in the legal treatment of all vertical restraints, including resale price maintenance. At the time I joined the Commission in late 1979, the Supreme Court had already rendered its decision in the GTE Sylvania case [1] which applied a Rule of Reason analysis to non-price vertical restraints. It was the belief of a majority of the Commissioners at that time that resale price maintenance remained per se illegal. This was apparently also the view of the Supreme Court in dictum in two decisions handed down subdequent to GTE. [2] Many scholars, however, had observed that there was no justification for making such a distinction between price and non-price vertical restraints. Both the Department of Justice and the FTC continued vigorous assertion of per se illegality for resale price maintenance, and at the Department, this even led to criminal prosecutions.

At the FTC, we commenced the Russell Stover litigation, [3] which, if successful would have expanded modestly the law of resale price maintenance as a per se unlawful offense. The Commission found a violation of law in that case, with the new FTC Chairman, James C. Miller, III, dissenting. The Commission found that it was a violation of law for a

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[1] GTE Sylvania, Inc. v. Continental T.V., Inc., 433 U.S. 36 (1977).

[2] Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982); California Retail Liquor Dealers Ass'n v. Medical Aluminum, Inc. 445 U.S. 97 (1980).

[3] 100 FTC 1 (1982).

manufacturer to terminate a dealer solely for the dealer's failure to comply with the manufacturer's suggested resale prices. The Court of Appeals vacated the Commission's decision,[4] observing that an expansion of the law beyond its existing parameters was a matter for the Congress to address, not the FTC or, for that matter, the courts.

Subsequent to the 1983 Russell Stover decision, a majority of the Commission moved in the direction of applying the Rule of Reason to resale price maintenance, in line with the view on that subject taken by many economists. The law itself had not changed, however, and there remained a strong impression that the Supreme Court remained committed to the per se doctrine. Eventually, however, certiorari was granted in the Monsanto case, [5] which advocates of the abandonment of the per se approach believed signalled the Court's willingness to extend the Rule of Reason to RPM. While the agencies and the antitrust community in general awaited the Monsanto ruling, the FTC pursued a limited program of RPM cases under the Rule of Reason approach, while the Justice Department abandoned enforcement efforts altogether in favor of promulgating its now famous Vertical Restraints Guidelines. The main purpose of both agencies' efforts was to assure that in any examination of alleged resale price maintenance, the government be required to take into account possible procompetitive explantions for fixed-price policies.

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[4] Russell Stover Candies, Inc. v. FTC 1983-2 Trade Cas. (CCH) ¶65,640 (8th Cir. 1983).

[5] Monsanto Co. v. Spray-Rite Serv. Co., 104 S. Ct (1984).

Only in clear cases where such vertical restraints had demonstrable anticompetitive effects would the government proceed in the investigative or prosecutorial effort. The Commission's then-leadership repeatedly stated that as long as the Rule of Reason was the method used to analyze RPM cases, the Commission would vigorously pursue resale price maintenance and other vertical restraints. [6]

In answer to questions posed to the Commission by the Senate Commerce Committee in 1983, former FTC Chairman James C. Miller

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[6] Former Bureau of Competition Director Timothy J. Muris expressed particular resolve that the Commission use a systematic approach to finding "good" vertical restraints cases:

> To expand our understanding of the effects of vertical restraints, we created a combined task force with the Bureaus of Competition and Economics. This task force is continuing its examination of available theoretical and empirical vertical restraints material to recommend an optimal enforcement policy towards vertical restraints.
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> In addition, within the Bureau of Competition, I have created a task force to examine ongoing investigations involving direct or indirect vertical restriaints. The purpose of the task force will be to identify those restraints that injure consumers. The circumstances under which vertical restraints are likely to be anticompetitive and injure consumers are now well understood. Vertical restraints are likely to harm consumers by reducing output when used to support either a manufacturers' cartel or a cartel of dealers selling competing brands. Whenever output restricting vertical restraints are identified -- restraints that injure consumers, I expect to recommend issuance of an administrative conplaint. Indeed, we will soon send to the Commission a complaint, accompanied by a signed consent agreement, that would require a trade association to cease coercing manufacturers to stop selling to discounters whose prices the trade association members did not like. (emphasis supplied) (Statement of Timothy J. Muris, Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business of the Committee on Small Business, U.S. House of Representatives, September 14, 1983.)

III argued that:

> The Commission . . . should pursue vigorously cases in which resale price maintenance stems from collusion or abuse of market power by manufacturers or dealers. This type of case-by-case evaluation of possible competitive problems is what Congress had in mind when it established the Commission as an expert body in the field of trade regulation.[7]

One rationale given for this departure from the per se approach to RPM was that Commission resources were limited and the proper exercise of sound prosecutorial discretion required that the Commission choose its investigative targets with care.

To the surprise of many attorneys and economists, the Supreme Court continued to adhere to the per se approach to resale price maintenance in its Monsanto decision, although it toughened considerably the applicable evidentiary standards used to define the offense. Basically, if a resale price maintenance situation is a result of a cartel on the part of either suppliers or resellers, it remains illegal without consideration of its specific competitive effects. This ruling nevertheless undermined the notion that resale price maintenance could also exist where a reseller was simply terminated by its supplier at the behest of a competing reseller.

I continued to acquiese without enthusiasm in an enforcement policy based on a Rule of Reason approach to RPM even after the Supreme Court reaffirmed per se treatment of RPM in the Monsanto

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[7] Answers of FTC Chairman James C. Miller III to questions posed by the Senate Committee on Commerce, Science, and Transportation, April 29, 1983.

opinion. It is my general philosophy that enforcement agencies have an obligation to take the law as they find it. I feel this way particularly in light of the fact that the Supreme Court declined the invitation to abandon the per se approach to RPM. The reality is, however, that a member of a collegial agency must bow to the majority will. After all, the Court had considerably narrowed the definition of what constituted the offense of resale price maintenance, and the Commission was involved in some investigative work consistent with the new standard. The question is: what have been the results of these alleged efforts?

The answer is that since the beginning of fiscal year 1985, the Commission's staff has commenced only three initial phase investigation of resale price maintenance and zero full phase investigations. The Commission has issued one administrative complaint in this three year period, and it has entered into its records exactly one consent order that was issued prior to the initiation of litigation. There have been three settlements of cases where litigation had been commenced. All four of the RPM consent orders entered since 1985 are derived from the single administrative complaint issued in 1985. Thus, aside from the progeny of this one administrative complaint there have been only three investigations of RPM by the Commission since 1985. These investigations are now closed.[8]

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[8] One civil penalty judgment was entered in 1986 in regard to resale price maintenance. The Commission's staff has also initiated two investigations of refusals to deal, both opened in the current fiscal year.

There are two possible explanations for this level of inactivity. One is that under the Rule of Reason approach used by the Commission, there just aren't any violations of the law. A second explanation is that our staff isn't looking very hard. If the latter is the case, as I suspect it is, the question is whether the FTC has any credibility when it lectures about the need to improve the analysis of resale price maintenance by applying the Rule of Reason instead of the per se doctrine. That, as I say, is not the real problem. The problem would appear to be, rather, that the government just isn't doing anything at all about resale price maintenance except talking about it.

If this is a fair conclusion, it is an unsatisfactory one, at least to me. It is the responsiblity of the Commission, as collective managers of taxpayer resources committed to the FTC, to ensure that those resources are wisely and efficiently allocated and employed. In our budget for FY 1987, a respectable $791,000 is allocated for pursuit of distributional restraints matters, including traditional vertical restraints, as well as potential violations of the Robinson-Patman Act. Some of those resources should be spent on resale price maintenance.

The question presented by S. 430 is whether some new legislation, such as that before the subcommittee today which would more clearly define what is illegal in this area, would result in more enforcement, new investigations, and new cases? I have doubts.

I have taken the view before, with respect to the call for

new antimerger legislation, that what is needed is not so much new law as new resolve to enforce existing law. By that I do not mean a massive shift towards per se cases, but a good faith effort to use the economic expertise we have to find and ferret out clearly anticompetitive practices, such as resale price maintenance currently held illegal by the Supreme Court, under the Monsanto ruling. The use of prosecutorial discretion to identify appropriate cases has always necessarily meant that not all technical violations of law can be redressed. What is really at issue, then, is not whether the Commission should use the Rule of Reason or the per se approach but whether the Commission will engage in the basic law enforcement which it is its job to do. Until it does, perhaps the Commission should hold off lecturing the Congress on the proper legal approach to use in investigating resale price maintenance.

PRESENTATION OF MARVIN SCHEIN IN SUPPORT OF S. 430 - THE HYDE FREEDOM FROM VERTICAL PRICE FIXING ACT OF 1987

A. Introduction

My name is Marvin Schein. I am President of Schein Dental Equipment Corporation, a company that introduced mail order distribution to the dental equipment market in 1982. I have worked in the retail end of the dental supplies and equipment industry since 1960, when I first started working part-time in my father's mail order dental supplies business, Henry Schein, Inc. I am here to tell you why I believe the proposed legislation to clarify the Monsanto doctrine is essential to a competitively healthy and diverse dental industry and to a competitive economy, in general.

What I will describe is an industry where there had long been meaningful price competition in the dental supplies market because of mail order, but where there had been no real price competition in the dental equipment area until we came along in 1982 and introduced a new, more efficient alternative form of distribution which lowered the cost of equipment to dentists by 25%.

That favorable competitive development now stands in danger of being reversed. In fact, there is a real threat that we may be headed for the days before my father started

his business -- a time when there was no mail order and no discounting in the entire dental industry - in both equipment and supplies. The most important force pushing us in that direction is the fact that Monsanto can be misused by inefficient but powerful companies which can pressure a supplier into cutting off their competitors. Manufacturers who would prefer to continue having their products sold by efficient, often innovative and price competitive companies are being forced to terminate them under the guise of Monsanto by powerful rivals. The ultimate result is higher prices and poorer service for the public.

Preliminarily, I would like to describe very briefly the Schein family operations because I believe they show how someone with a good business idea and a lot of work can create something that both makes money for himself and benefits the consumer. In 1930 my father first started selling dental supplies on a mail order basis. That was a revolutionary idea at the time. It was an idea, however, that made good business sense to the dentist. As a result, today mail order accounts for over 50% of dental supplies sales. Henry Schein Inc. is the biggest of the mail order sellers with over $200 million in annual sales. As I'm certain your dentists will confirm, Schein is one of the best known and well respected names in the dental industry. I must emphasize, however, that we succeeded not simply because

we introduced lower prices. We succeeded because we also provided high quality, professional service - the kind of service you need if you expect to enjoy repeat sales and that has made dentists over several generations satisfied Schein customers.

My father did not limit his business efforts to dental supplies. In 1950 he introduced the idea of selling generic drugs to physicians. This was the beginning of the widespread use of generic drugs which ultimately has developed in this country and has helped millions of Americans reduce their health care costs.

In the late 1950's my father started to fill prescriptions on a mail order basis. As a result of his efforts and the efforts of others, Americans who have a recurring need for certain drugs, such as the diabetic or the person suffering from arthritis, can make mail order purchases in quantities and at prices that substantially lower their health care costs.

In the late 1970's, I began to recognize that another area seemed ready for the Schein approach - the area of dental equipment. I would now like to describe what took place.

B. The Dental Equipment and Supplies Industry

Dentists buy basically two types of dental products -- dental supplies and dental equipment. Dental supplies

(which consist of such items as cements and impression materials and small "handpiece" type equipment) have been sold on a competitive basis for a long time, principally because of the competition supplied by mail order operations such as Henry Schein.

The dental equipment segment of the market consists of large equipment, such as dental chairs, x-ray machines, delivery systems and cabinets. Until 1982, when my company came out with its first catalog, the dental equipment market was different from the dental supplies market in one very important respect - there was no meaningful price competition in the dental equipment market. Most sales were made at or very near the manufacturer's suggested retail price.

A distributor in the dental industry is expected by the dentist to carry all major lines.[1] Because of this "one-stop shopping" aspect to the industry, it makes it very difficult for a distributor to compete effectively if he is lacking a major brand of dental equipment. Many dentists simply will not bother to purchase two different pieces of equipment from two different sources. As a result, if I am unable to sell one major brand of x-ray equipment, I will

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1. Both the dental equipment market and the dental supplies market utilize the same three-level distribution system: (1) suppliers sell to (2) distributors, consisting of chain dealers, independent (or non-chain) dealers and mail order companies, who in turn sell to (3) dentists in private practice as well as at military facilities, government sponsored dental clinics and dental school operations.

lose sales of other types of different brand equipment (such as dental chairs and delivery systems) that dentists would ordinarily buy along with the x-ray unit.

One further aspect of the dental equipment market is competitively significant -- the market is highly concentrated at both the supplier and the distributor levels. It has long been the case that over 95% of the $300 million in dental equipment sales made annually by suppliers has been accounted for by fewer than ten companies. In fact, the number of companies is shrinking. For example, the largest supplier of dental x-rays in the United States expanded into the non-x-ray market in 1985 by purchasing the second-largest supplier in the U.S. of dental chairs, delivery systems and related products. One year later, in 1986, that same x-ray company tried to buy the second largest supplier of "panoramic" x-ray equipment. Based on 1984 and 1985 statistics, the two entities, if combined, would have about 60% of the panoramic x-ray market.

The industry is also concentrated at the distributor level. Three chains have dominated dealer distribution. The two largest chains together account for over 50% of dental equipment sales to dentists. In some geographic areas, such as Savannah, Georgia, Akron, Ohio and Salt Lake City, Utah, one of these chains is the only distributor. The largest chain, in fact, was the subject of

a successful Clayton 7 divestiture action by the Justice Department in the mid-1970's arising out of the acquisition of four of the eight largest dealers in the New York City metropolitan area. The judge in that case noted that, while mail order had brought meaningful price competition to the dental supplies market, there was no comparable competitive presence in the dental equipment market and therefore divestiture was necessary.[2]

The high level of concentration in the dental equipment market makes it extremely difficult for a company like mine, which is dedicated to real price competition, to survive. Dominant distributor chains have the power to pressure manufacturers to cut off competing distributors and to extract favorable prices and terms from suppliers that are not offered to other distributors. In fact, as I will shortly explain, it is precisely such pressure which led to my company's termination by a major x-ray supplier.

C. Schein's Introduction Of a New Alternative Form Of Distribution That Brought Price Competition To the Dental Equipment Industry

When some people hear that we sell on a mail order basis, they mistakenly think of a no assistance, no frills operation. That has never been the Schein way and it is not the way Schein Dental Equipment operates. We developed, so

2. United States v. Healthco, 387 F. Supp. 258, 259, 261-62 (S.D.N.Y.), aff'd, 535 F.2d 1243 (2d Cir. 1975).

to speak, a "better mousetrap" that made it possible to provide a dentist with both a "full service" operation and low prices. Our entry into the market was precisely the sort of favorable competitive development the antitrust laws were designed to promote and protect.

As you can see from the Schein catalog you have been given, our operations clearly are not a "small print, back of the magazine ad, no frills" operation. We offer a yearly catalog almost 180 pages in length that is attractively designed, easy to read, loaded with product photographs, information and specifications and printed on durable and high-quality glossy paper. Everyone in the industry acknowledges that our catalog is top-of-the-line.

The catalog is sent to 80,000 of the approximately 110,000 dentists in private practice in the United States. In addition, two or three mailings of additional promotional materials, often alerting dentists to new product developments, are sent to dentists annually. A dentist's first interest in purchasing equipment is thus often the result of our efforts. This is especially the case with higher end products which would be prohibitively expensive for some dentists to buy at the manufacturer's suggested retail price, but which comes within the financial reach of the dentist at Schein's discounted price.[3]

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3. For example, the suggested retail price on one major
(footnote continued)

The price competition my company has introduced means important benefits for the public. We have significantly reduced the cost to start up a dental office for a young dentist looking to open his or her own practice.[4] Sometimes this price difference has meant the difference between opening and not opening a practice. In most cases, it has made it possible for the dentist to keep down the prices he charges his patients for his services.

As a variety of articles have recently pointed out, all dentists, and not just the ones starting out, are facing steadily escalating costs. Any savings a dentist can realize when he goes to replace old equipment becomes an important factor in helping the dentist control his overhead and keep his prices from spiraling upwards.

Another way in which the public benefits from our low prices is that expensive referrals by one dentist to a second dentist can be reduced when the first dentist can

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(footnote continued from previous page)
brand panoramic x-ray in 1983 was $19,245. Our price, without installation, was $12,950, or 33% lower. Even after adding in the cost of installation (about $500 at the time for this unit), our price was 30% below the suggested retail price. It is therefore not surprising that dentists have told me that they could not have purchased that x-ray except for my lower prices.

4. If a young dentist paid the manufacturer's suggested retail price to equip one room with major brand dental equipment, he would have to spend about $30,000. If he purchased the same equipment from us, however, it would cost him about $18,000.

afford to buy certain equipment he previously did not own.[5] Schein's low prices also have an additional favorable effect on health care costs as well as safety in that they encourage dentists to replace existing equipment sooner than otherwise would be the case. This can mean increased efficiency and cost savings to a dentist as older, less efficient or versatile equipment, or poorly functioning equipment, is replaced. It can also mean safer dental care for the public as equipment with new safety features replaces older equipment.[6]

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5. For example, the most expensive item of dental equipment is a panoramic x-ray. The current manufacturer's suggested retail price for one brand of panoramic x-ray, for example, is $20,995. Unlike the smaller and less expensive intraoral x-ray which takes single exposure x-rays on film placed inside the patient's mouth, the panoramic x-ray has both the radiation source and the film outside the patient's mouth and revolves around the patient's head as it takes a series of exposures. There are a variety of things that a dentist can do only with a panoramic x-ray unit, such as obtaining an x-ray of the entire jaw area in order to detect bone disease. Thus, a dentist who wishes to do such work who does not have a panoramic x-ray unit ordinarily must send his patient to another dentist. Schein's prices have made it possible for more dentists to purchase panoramic units and, as a result, have helped make separate, costly visits to a second dentist unnecessary.

6. For example, it was once considered less "messy" and hence preferable to have a water retraction feature in an operating system that sucked back the water in the handpiece at the end of use. Today, with the growing concern about AIDS infection, the preferred system is one in which the water near the tip of the handpiece is not retracted but, instead, is ejected after the handpiece is last used. Schein's low prices can mean the difference between a dentist buying a safer ejection-style operating system today rather than one or two years from now.

I have been describing how Schein's low prices benefit the public. I want to emphasize, however, that the Schein operation is not simply limited to providing a dentist with lower prices. We offer a full service operation that can satisfy all of the dentist's needs. Many dentists have found us to be a welcome alternative to inattentive or inept local dealers.

Our catalog is only the beginning of the contact with the dentist, who can call a toll-free number and receive expert assistance from one of Schein's highly trained staff. This can take the form of product advice, technical assistance, the providing of design suggestions and architectural drawings and a host of other forms of assistance, such as making the dentist aware of health-related improvements in newly introduced equipment.

The dentist who buys from Schein is assisted at the local level by independent service organizations ("ISO's") which we recommend to the dentist to handle equipment installation and repair. These ISO's typically are servicemen who worked for the Government or for other dealers and have gone out on their own as full-time service operations. There are now more than five hundred of these small businessmen around the country which we recommend. In many cases, they are the only alternative dentists have to the often ineffective service departments of local dealers

who are more interested in selling equipment to the dentist than taking care of important servicing and repair needs.

The continued viability of the ISO's is heavily dependent on the continued existence of Schein, which supplies many ISO's with spare parts and refers installation and repair business to them. If Schein is eliminated, it can be expected that many ISO's will likewise go out of business and no longer will be available to dentists as competitive alternatives to dealer service departments.

ISO's are technical service operations and therefore do not have equipment showrooms. This, however, is of no real consequence. To the extent a dentist feels the need to "kick the tires" of equipment he is considering purchasing, this is invariably done at dental conventions where each supplier displays his full equipment line. I might add that the extensive and complete inventory of equipment on display at dental conventions stands in marked contrast to the very limited selection that, with luck, may be available in a dealer "showroom." Schein also can refer a prospective purchaser to a nearby dentist who has already purchased the equipment in question. Some suppliers, in fact, have referred dentists to offices designed by Schein to show how their equipment can be effectively installed and utilized. In a nutshell, the Schein operation offers a dentist full service at highly competitive prices.

D. The Dealer Campaign to Destroy Competition

Schein's entry into the dental equipment market at first went smoothly and had the support of the equipment suppliers. In 1981, I explained to each major supplier my plan to sell dental equipment on a mail-order basis. I wanted to make certain, in order to protect the Schein name, that we would be getting the full cooperation of each supplier and a commitment to provide us with the same sort of product support made available to other dealers. Not surprisingly, gives Schein's track record in the industry, the suppliers agreed to participate. Here was decision making that truly was unilateral and designed to advance each supplier's business interests.

The first catalog, which came out in January 1982, was uniformly met with praise from the suppliers. The dealers, in contrast, viewed the catalog with alarm because it now made it impossible for them to continue to price at or near the manufacturer's suggested list price. I would like to quote (with my emphasis added) what one former chain dealer salesman said about the dramatic impact of the catalog:

> The appearance of the premier edition of the Schein Dental Equipment catalog in 1982 created quite a stir in the industry. While dealers up until that time had to compete with mail order in the supplies area, they had managed to keep discounting at a minimum in the equipment area. The introduction of the Schein Dental Equipment catalog completely changed all this. Whereas before the introduction of the Schein Dental Equipment catalog the standard

for price negotiations with a dentist was typically the manufacturer's suggested retail price, after the introduction of the Schein Dental Equipment catalog the prices in the catalog became the new standard.

Rather than compete with us "on the merits," dealers, and especially the chain dealers, began to exert extreme pressure on the suppliers to stop dealing with us. Initially, no major supplier acquiesced; instead, some of the suppliers proceeded to take measures which were designed to make us less competitive with other dealers, such as refusing to perform "follow up" calls for dentists who had purchased from us, giving other dealers better prices while trying to cut back on the discounts we were receiving and generally "bad mouthing" us to dentists. One supplier even went so far as to try to persuade me, at a chain dealer's request, to raise my prices. The suppliers all also advised me about the pressure and threats of boycott they were receiving from the dealers.

Finally, in April 1983, the largest x-ray supplier informed me that it would no longer permit its dental equipment to be sold on a mail order basis. About one year later, a supplier that sells about 70% of the delivery systems in the United States, announced a similar plan to end mail order sales; however it has held off implementing its plan because of pending antitrust investigations by the FTC and the States of New York, Connecticut and Massachusetts.

I have commenced a lawsuit against the x-ray manufacturer and against the two largest chain dealers charging them with violating the antitrust laws. I cannot, because of the protective order entered in our lawsuit, enumerate the various instances of coercive and concerted conduct that we contend led to one termination and which form the basis of our antitrust claims.[7] One example I can cite, however, will give you a flavor for the situation. Around the same time of the subject termination, another dental x-ray manufacturer (now out of business) was in the process of developing a dealership agreement that prohibited mail order sales. The executive responsible for implementing the plan admitted, when deposed, that the purpose of the agreement was to eliminate mail order and the agreement never would have been developed except for price-related pressure from the chain dealers. In fact, the supplier even had generated an internal memorandum that stated that the major chain dealers were "refusing to purchase [the supplier's] ...x-ray units...until the supplier...discontinue[d] sales of such units to Schein."

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7. We have filed very lengthy and detailed motion papers opposing summary judgment against us in that action. The matter is still sub judice. Significant portions of the papers have been supplied to the Attorneys General of New York, Connecticut and Massachusetts, and to the FTC, in connection with their pending investigations of antitrust violations in the dental industry.

E. Competition Will Be Severely and Adversely Affected If Schein Is Eliminated

There is no question that Schein Dental Equipment has had a positive effect on competition in the dental equipment industry. First, it has been the catalyst for vigorous price competition that did not exist before. Schein has been responsible for lowering equipment costs for dentists by over 25% either because dentists have bought the equipment from us or, where they have bought from others, because other dealers have lowered their prices to compete with ours. Second, Schein has enhanced competition of a non-price nature by making available to all dentists an alternative source of highly competent product information, technical assistance and office planning services. Third, Schein's operations have critically enhanced the economic viability of ISO's and, as a result, have freed the dentist from relying solely on the local dealer for installation and repair.

Schein's continued existence is of competitive importance to all dentists, whether they choose to buy from Schein or not. The competitive alternatives made possible by Schein are particularly important to dentists located in parts of the country which are serviced by only one dealer or by dealers located substantial distances away or by dealers who provide less than professional service.

If Schein, a household name in the dental industry, is driven out of the dental equipment business, there is little doubt that the industry will not see the emergence of any other similar competitive force in the foreseeable future. For anyone to suggest that supposed potential new entry by other competitors will make up for Schein's demise is both unrealistic and unsympathetic to the needs of dentists and the public they serve.

In supporting the proposed legislation, I am not looking for favors or any unfair advantage. All that Schein and other companies like us want is to be able to compete "on the merits." Without the proposed legislation, we will be denied that opportunity to our detriment and to the detriment of the public.

The prospect we face, if the proposed legislation is not enacted, is the elimination of price competition as we have known it for decades. In the dental industry, for example, we are not simply talking about returning to 1981, before my company introduced price competition to the dental equipment industry; we are talking about going back to when my father started his business -- when mail order and discounting were not even available in the area of dental supplies.[8]

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8. I do not believe I am being either alarmist or unrealistic when I advance this view. One of the x-ray suppliers which succumbed to dealer pressure in 1983 and introduced a (footnote continued)

F. Monsanto Is Too Susceptible to Abuse and Places Unrealistic and Unfair Burdens Upon A Terminated Distributor

Monsanto should not be viewed as having simply made it a bit more difficult for the terminated dealer to prove a § 1 case. Instead, and I cannot overemphasize this point, price competition as we know it will be destroyed if Monsanto, as presently interpreted by many courts, continues to be the law governing dealer terminations. Monsanto, as interpreted, allows far too much of an opportunity for abuse by inefficient but powerful distributors and by the suppliers who are pressured into terminating dealers by these distributors. It simply is too easy for a supplier to fabricate "business reasons" to support a termination. When, as recently happened with one dental equipment supplier, mail order sales can be prohibited based on the absurd claim that a stool or a cabinet is "sophisticated equipment", there is no real protection left for price competition.

Before Monsanto, the supplier who wanted to continue dealing with a discounting dealer could resist dealer pressure to terminate the discounter by pointing out that he stood in danger of violating the antitrust laws if he acquiesced to the price related dealer pressure. Now that

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(footnote continued from previous page)
dealership agreement which prohibited mail order sale of its dental equipment has indicated that even before the agreement was implemented, one chain dealer was already asking when the policy would be extended to dental supplies.

same supplier finds it far more difficult, if not impossible, to resist on that basis and, as a result, is being forced, against his wishes, to get rid of efficient and often innovative distribution operations such as mine. The effect has been to change the power balance in favor of the "big guys" to the detriment of suppliers, efficient distributors, efficient retailers and the public.

This is not the only problem with Monsanto as contrued by the courts. The terminated dealer is not only the victim of a double standard, but is also deprived of his day in court. It is my understanding that Congress and the President, in passing and signing H.R. Res 303, intended to affirm that vertical price fixing was not to be treated differently than horizontal price fixing. Yet Monsanto as now interpreted places greater demands on the plaintiff trying to prove a vertical price fixing case. This discrminatory treatment isn't fair, nor is it likely to achieve correct results.

The treatment isn't fair for several reasons. First, it seems inconsistent with what Congress has said about vertical price fixing. Second, it isn't fair because it deprives a plaintiff of his right to a jury trial. While I totally support the view that frivolous cases should not go to trial, the test as applied by the courts today is keeping meritorious cases from going to a jury. As a businessman who

has been involved in costly antitrust litigation, I can assure you that the last thing I or any rational businessman would do would be to pursue a frivolous lawsuit. On the other hand, it isn't fair to deprive a businessman of his right to a jury trial when he has raised genuine issues of fact, especially when the outcome of his case can mean the difference between economic success or disaster.

The courts' treatment of plaintiffs in vertical price fixing cases is not only unfair, but is likely to lead to incorrect results. The simple fact is that there is almost never a "smoking gun" in either a horizontal or a vertical price fixing case. Your case typically is proven through circumstantial evidence - the pieces of a puzzle which, when put together, warrant a reasonable conclusion that an antitrust violation has been proven. That process of weighing sometimes conflicting pieces of evidence can only be done in a meaningful way at trial, where the trier of fact has a chance to look a witness in the eye, assess his demeanor and reach some conclusion about his truthfulness. It is this process, and not the review of a cold record by a judge in a summary judgment motion, that will achieve just results in antitrust cases.

The determination of whether a conspiracy has been shown or whether a business justification has been disproven belongs at trial. For example, what can you do as a

plaintiff when you recall attending a meeting with a supplier where no complaint was made about your operations, yet that supplier, after he becomes your adversary once litigation has commenced, "recalls" having expressed numerous "concerns" about your operations at that same meeting? What you try to do is develop as much circumstantial evidence as possible to discredit your adversary's account. In the typical case, where virtually all of the evidence is in the supplier's possession, you can almost never definitively disprove his claims. Yet, too often Monsanto is read to require something of that sort - something a plaintiff can almost never provide. If these are the rules of the game in a vertical price fixing case, the game, for all intents and purposes, is over and the defendants have won.

G. Conclusion

I firmly believe that if the proposed legislation is not enacted, price competition as we know it will disappear from our economy. The sort of competitive breakthroughs that took my father's business from "mom and pop" size to a multimillion dollar enterprise, all while bringing lower prices to the public, will no longer be possible as suppliers find themselves at the mercy of powerful but inefficient companies who "compete" by bringing about the termination of their more innovative and discount oriented competitors. The sort of competitive climate that

made possible the emergence and growth of Schein and the ISO's will disappear. The rule of economic "muscle" will replace the era of business innovation and competition.

Monsanto, in my view, creates serious problems at two levels. First, it creates virtually insurmountable and unfair obstacles for the private litigant. The result is that (1) terminated distributors will fail to bring meritorious suits, (2) fewer meritorious suits will get beyond the summary judgment stage and (3) the few plaintiffs that finally make it to trial will have done so at extraordinary effort and expense far beyond the financial means of most terminated distributors.

The second major problem Monsanto creates is that it makes it far more difficult for suppliers to resist pressure from powerful distributors. Unilateral decision making by suppliers will be replaced by decisions imposed on unwilling suppliers by powerful distributors. It would be the supreme irony if Monsanto, which was based on a concern for a supplier's right to make unilateral decisions, became the vehicle for powerful distributors to deprive suppliers of that right. I can assure, it will happen. Once the economic dinosaurs in this country know they can hold back the tide of competitive progress, they will do so.

I believe that ultimately the best and only effective way to determine whether someone was terminated for

unlawful reasons is to let an American jury hear the two sides and decide which one is telling the truth. Any attempt to short circuit that process by resort to a mechanical rule that fails to consider the realities of the market place is not only unfair, but is also sure to destroy meaningful competition in this country. I believe the proposed legislation goes a long way toward preventing such an unfair and counterproductive result.

Marvin Schein
President
Schein Dental Equipment Corp.

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April 29, 1987

The Honorable Howard M. Metzenbaum
Chairman, Subcommittee on Antitrust,
Monopolies and Business Rights
United States Senate
Washington, D.C. 20510

Dear Senator Metzenbaum:

I am pleased to have this opportunity to comment on S. 430, "The Retail Competition Enforcement Act of 1987," on behalf of The Business Roundtable. I am Chairman of The BFGoodrich Company and I am also Chairman of the Roundtable's Antitrust and Government Regulation Task Force.

The Business Roundtable is an association of about 200 chief executive officers of substantial companies that are widely dispersed by geographic location and by category of business. Many Roundtable companies, including my own, sell their products through distributors or dealers who resell those products to ultimate consumers. Since we depend on these distributors or dealers to market our products, we have a vital interest in the legal principles that govern our relations with them.

I regret that The Business Roundtable is unable to support S. 430. The Roundtable, however, supports the decision of the Supreme Court in the Monsanto case. That decision is consistent with the law as we have always understood it, and it takes account of business reality. The Roundtable, therefore, opposes bills like S. 430, insofar as they would undercut the Monsanto decision.

An explanation of The Business Roundtable's position on S. 430 requires a detailed discussion of antitrust law. Although I started my career with BFGoodrich as a lawyer, I do not consider myself an antitrust expert. Accordingly, I have asked experienced antitrust counsel to prepare the attached memorandum, which sets forth the Roundtable's position. On behalf of the Roundtable, I endorse this memorandum and adopt it as my own statement.

On behalf of The Business Roundtable, I urge this Subcommittee to reject S. 430.

Sincerely,

John D. Ong

Attachment
Cc: Members of the Subcommittee
2738n

STATEMENT OF THE BUSINESS ROUNDTABLE
ON S. 430
"THE RETAIL COMPETITION ENFORCEMENT ACT OF 1987"

BEFORE THE
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES
AND BUSINESS RIGHTS

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

April 29, 1987

78-774 O - 88 - 8

STATEMENT IN OPPOSITION TO S. 430

The Business Roundtable opposes S. 430, "The Retail Competition Enforcement Act of 1987," since it would overrule the Monsanto 1/ decision. The Roundtable supports Monsanto because it is consistent with prior law and because it recognizes business reality. Monsanto is both sensible and fair.

I. The Monsanto Decision Is Consistent With Prior Law

It may be useful to begin with some basic legal principles that are widely accepted, and then to show how Monsanto is fully consistent with those principles.

A. A Manufacturer Can Choose Its Customers

A business normally has the right to select its own customers. That principle was expressed almost 70 years ago in the Colgate case: 2/:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

The sponsors of S. 430 do not appear to quarrel with this principle. In his introductory statement, Senator

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1/ Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

2/ United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

Metzenbaum said that S. 430 "would still allow defendants to present evidence that they were acting independently or for nonprice reasons" if a dealer termination were challenged. 3/ The Roundtable disagrees with the sponsors about the appropriate burden of proof in these situations, but it is encouraging to find agreement on the basic right of a manufacturer to select its dealers.

It is also settled law that a manufacturer is free to select dealers who have similar ideas about the way the manufacturer's products should be marketed. For example, if a manufacturer thinks, rightly or wrongly, that sales through discount outlets will discourage other dealers from extending a full range of services, or will cheapen the image of its product and adversely affect its overall sales, the manufacturer does not have to sell through discount outlets. This principle was specifically affirmed in Monsanto, but it has been recognized for a long time. 4/ When Congress eliminated the so-called "Fair Trade" exception to the antitrust laws in 1975, the legislative history nevertheless

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3/ Cong. Rec. S1483-84 (daily ed. Feb. 2, 1987).

4/ A leading case on this point is United States v. O.M. Scott & Sons Co., 303 F. Supp. 141 (D.D.C. 1969), a decision which was not appealed or questioned even at the height of populist antitrust enforcement.

made it clear that "the manufacturer has the right to select distributors who are likely to emphasize service." 5/

Unless a manufacturer has a monopoly, it is also legal to limit the number of dealers appointed in any given area, to the point of granting an exclusive franchise to a single dealer. This right was recognized even in the Schwinn case twenty years ago: 6/

> [A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods.

Schwinn, of course, is the case that otherwise took such a harsh view of vertical arrangements that it was overruled only ten years later in Sylvania. 7/ The point is that a manufacturer's right to distribute products selectively has always been well established and understood, even in a period when the antitrust laws were interpreted expansively, and that right has been reaffirmed many times since. 8/

5/ "Consumer Goods Pricing Act of 1975", S. REP. NO. 94-466, 94th Cong., 1st Sess. (1975), reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1571.

6/ United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967).

7/ Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

8/ See cases collected in ABA Antitrust Section, Antitrust Law Developments 66 n.450 (2d ed. 1984).

Moreover, that right is not defeated simply because selective distribution is suggested by the dealer; in fact, it is clear that a manufacturer can legally respond to the ultimatum: "pick him or me." 9/

To recapitulate: the law has long recognized a manufacturer's right to choose its customers and sell or not sell to particular dealers. The manufacturer can refuse to deal with discounters and it can limit its sales to full-service dealers if it chooses. In fact, the manufacturer can refuse to sell to any competitors of a given full service dealer, and it does not matter that the dealer insisted on the restriction.

B. Limitation Based on Resale Price Maintenance

If all of these statements are well settled, how can a manufacturer violate the law simply because it discontinues sales to a single dealer in response to complaints from another dealer with which the manufacturer prefers to do business? The short answer is that ever since the Dr. Miles 10/ case, it has been illegal per se for a manufacturer and its dealers to agree

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9/ See, e.g., Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.)(en banc), cert. denied, 439 U.S. 946 (1978); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957).

10/ Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

on resale prices. As a result, a dealer termination that is perfectly legal in the context of a selective or exclusive distribution system is illegal if it implements a resale-price agreement between the manufacturer and other dealers. 11/ It could also be illegal if it implements a horizontal price conspiracy at the dealer or manufacturer level. The very practical problem is how to tell the difference between the legal and the illegal conduct.

This is the problem which was resolved by the unanimous decision of the United States Supreme Court in Monsanto. The Monsanto decision was compelled by logic and by necessity. We will address the necessity in a moment, but it is also important to understand the logic. As noted above, termination of one dealer in response to complaints or even ultimatums by another dealer is illegal only if it serves to implement a price-fixing conspiracy; it is otherwise legal. If a termination in response to dealer complaints without more is sufficient to support an inference that an illegal conspiracy exists, as S. 430 would provide, then the plaintiff would be permitted to lift himself by his own bootstraps: conduct A (termination) is illegal only if the plaintiff can prove B

11/ An exclusive or selective dealing arrangement may also have anticompetitive effects if the manufacturer is a monopolist, but that is a separate antitrust concern that is not an issue here because it is not affected by the Monsanto decision.

(conspiracy), but the plaintiff can prove B (conspiracy) just by proving A (termination).

The Monsanto Court unanimously rejected the suggestion that a plaintiff be able to bootstrap its way to recovery. The Court said that a plaintiff must also "present direct or circumstantial evidence that reasonably tends to prove the manufacturer and others 'had a conscious commitment to a common scheme. . . .'" 12/ That is not an impossible burden. In fact, the Court held in Monsanto that there was enough evidence to present a jury question on this issue, and the plaintiff's verdict was affirmed.

The Monsanto decision follows logically from principles that have long been established and accepted. Justice Brennan, who has consistently supported vigorous antitrust enforcement, said in concurrence that the decision "properly applies Dr. Miles to this case." 13/ The decision is in the mainstream and does not establish an illogical or impractical standard, as some supporters of S. 430 claim. 14/

12/ 465 U.S. at 764, quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3rd Cir. 1980), cert. denied, 451 U.S. 911 (1981).

13/ 465 U.S. at 769.

14/ See Statement of Robert Abrams at 1 (April 23, 1987); Statement of Harry First at 1-2 (April 23, 1987).

Rather, it is S. 430 that would be a radical and impractical departure from the law as it has been for many years.

II. The Monsanto Decision Recognizes Practical Reality

The Monsanto decision is supported by practicality as well as by logic and precedent. A manufacturer may want to discontinue business relations with a dealer for any number of legitimate reasons; the right to do so was established by Colgate in 1919 and reaffirmed many times since. That right of dealer selection is substantially impaired if the manufacturer risks an antitrust claim whenever the terminated dealer has been the target of complaints by other dealers.

As the Supreme Court recognized in Monsanto, dealers are an important source of market information for manufacturers. The Court also recognized that it is natural for dealers to complain about their competitors, and a manufacturer cannot control what its dealers choose to complain about. A manufacturer also may have its own set of complaints. It is unfair to compel a manufacturer, by the threat of treble-damage liability, to continue an unwanted business relationship just because other dealers have complained.

The practical wisdom of the Monsanto rule is illustrated by a number of recent cases. In Magid Mfg. Co. v.

U.S.D. Corp., 15/ for example, a manufacturer, faced with declining sales, decided to establish exclusive territories for its dealers to promote services to prospective customers. The plaintiff was a nationwide dealer who was terminated because its catalog sales method was incompatible with the new program. The plaintiff, however, claimed termination was based on concern by other dealers about its discount pricing. The court found no conspiracy and held that manufacturers should be free to use information obtained from all sources as they see fit. Without the Monsanto rule, the existence of dealer complaints would have made it perilous for this manufacturer to change its distribution system.

In Computer Connection, Inc. v. Apple Computer Corp., 16/ plaintiff, an Apple computer dealer, sold Lisa Computers, which were highly sophisticated business computers and required extensive training, without authorization or training. It continued sales after warnings from Apple. Other dealers had also complained about plaintiff's price cutting. The court held there was a legitimate reason for termination. Again, it would have been dangerous to terminate this bad dealer without the protection of the Monsanto rule.

15/ 1987-1 Trade Cas. (CCH) ¶ 67,447 (N.D. Ill. 1987).

16/ 621 F. Supp. 569 (E.D. La. 1985).

Edward J. Sweeney & Sons v. Texaco, Inc., 17/ was a decision on which the Monsanto Court relied. Texaco threatened to terminate Sweeney, a Texaco wholesaler and distributor, because of credit card irregularities and customer complaints, and because Sweeney was delivering non-Texaco fuel to Texaco stations in Texaco trucks! Sweeney claimed that this threatened termination was an antitrust violation because competitors had complained about his pricing policies. If the court had not applied the standard of proof that was ratified by Monsanto, Texaco could have been forced to sell indefinitely to this duplicitous distributor.

Even the Garment District case, 18/ which has been repeatedly cited by critics of the Monsanto rule, provides a compelling illustration of the problems a different rule would create. Jantzen, a clothing manufacturer, sold to Garment District, a discount house, and to 200 outlets in the Belk chain of department stores. Belk apparently believed that the discount house sales cheapened the image of the Jantzen

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17/ Supra n.12.

18/ Garment District, Inc. v. Belk Stores Services, Inc., 799 F.2d 905 (4th Cir. 1986), petition for cert. filed, 55 U.S.L.W. 3394 (U.S. Dec. 2, 1986)(No. 86-794). The Supreme Court may well decide that there are additional facts in this case which make the Monsanto rule inapplicable. A Supreme Court reversal would not provide support for S. 430; it would simply demonstrate that the Monsanto rule is sufficiently flexible to accommodate varied factual situations. See discussion in Section III. E infra.

products and it put pressure on Jantzen to stop them. In the meantime, it discounted prices on Jantzen products itself and sold them in its bargain basement. It also indicated its intention to discontinue sales of Jantzen products. Jantzen ultimately was faced with an unpalatable choice between the loss of 200 Belk outlets and the loss of the plaintiff dealer. Not surprisingly, it chose to maintain 200 outlets. If S. 430 were the law, Jantzen would risk antitrust liability if it did so. (In this case, the plaintiff sued both the chain store and the manufacturer.)

Note that it probably would have been perfectly legal for the Belk chain to bargain for the exclusive right to sell Jantzen products. The termination of a single outlet like the Garment District has far less impact on competition than an exclusive-dealing arrangement, but S. 430 would make it far easier to challenge an individual termination than an exclusive arrangement. That really would be a radical and impractical departure from existing law.

III. The Arguments for S.430 Are Not Persuasive

The arguments advanced in support of S. 430 at the April 23, 1987 hearing before this Subcommittee seem to have been based on a misunderstanding of the Monsanto decision and the legal principles upon which it is founded. There also were a number of factual claims that have no support. This section will address the most significant arguments.

A. Monsanto Does Not Undercut the Per Se Prohibition Against Resale Price Maintenance

Some testimony seemed to be predicated on the quixotic notion that Monsanto, and the cases that apply it, are contrary to established Supreme Court precedents with respect to resale price maintenance. 19/ This is not so. The Monsanto Court expressly declined to re-examine the longstanding rule that resale price maintenance is per se illegal, and the decision is therefore based on the assumption that Dr. Miles is still good law. Whatever the merits of that rule may be, it is not necessary to overrule Monsanto in order to preserve it. On the contrary, as we have shown, overruling Monsanto would have the effect of overruling Colgate and a long line of authority upholding a manufacturer's right to select its customers.

It seems to be conceded by the supporters of S. 430 that manufacturers can require distributors to provide full service and advertising, and may decline to sell to merchants who do not do so. 20/ What they apparently fail to appreciate is that manufacturers do not have the luxury of making these decisions in a vacuum. A manufacturer may well be willing to distribute goods both through full service and through discount outlets, when both can survive side-by-side, but may be

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19/ See, e.g., Abrams, supra n.14, at 1-4.

20/ See, e.g., Statement of Sen. Metzenbaum, supra n.3.

unwilling to sacrifice its full-service channels if they cannot compete with discount stores that do not incur the costs of full-service operations. In that case, the manufacturer may have to make a choice. The law protects that choice, even though the need to make it may have been precipitated by an ultimatum from one of the manufacturer's full-service outlets.

The legality of exclusive or selective dealerships does not depend on which party bargained for it; it depends rather on the availability of substitutes for the manufacturer's product. 21/ This is so even though a distaste for price competition may have prompted a dealer's demand for an exclusive arrangement. A manufacturer's refusal to deal with a single competitor of a particular full-service dealer is obviously less restrictive than a manufacturer's refusal to deal with all that dealer's competitors, and it should not be judged by a harsher test. It is therefore wrong to assert, as supporters of S. 430 do, that the termination of a discounter "at the behest of a powerful full-price retailer" should permit an inference of a price-fixing agreement that is illegal per se. 22/

21/ See cases cited in ABA Antitrust Section, Antitrust Law Developments 66-67 (2d ed. 1984).

22/ See Statement of Monroe G. Milstein at 15 (April 23, 1987).

It is possible to uphold the per se strictures against vertical price-fixing without engulfing the rest of the antitrust laws. That is what the Supreme Court did in Monsanto when it required some evidence of an illegal price agreement above and beyond evidence of complaints and a termination.

B. Monsanto Does Not Bar Proof of Conspiracy by Circumstantial Evidence

Some supporters of S. 430 have argued that Monsanto and its progeny place "an impossible burden of proof" 23/ on plaintiffs because it is obviously difficult to find direct proof of a price-fixing conspiracy. But Monsanto does not require direct proof; purely circumstantial evidence will be enough. The Court said that "plaintiff should present direct or circumstantial evidence" 24/ of a commitment to a common scheme.

Lower courts have recognized that Monsanto permits circumstantial proof. Some witnesses, for example, criticized the Sharp case, 25/ which overturned a plaintiffs verdict because the trial court's instructions did not require the jury to find a resale price agreement between the manufacturer and

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23/ Id. at 15; see also Abrams Statement, supra n.14, at 2.

24/ 465 U.S. at 764 (emphasis added).

25/ Business Electronics Corp. v. Sharp Electronics Corp., 780 F.2d 1212 (5th Cir. 1986), petition for cert. filed, 54 U.S.L.W. 3795 (U.S. June 3, 1986)(No. 85-1910).

the complaining dealer. But, the court did not dismiss the case; it remanded for a new trial on that issue. It held that the jury could properly find an illegal agreement, even though there was "little, if any" 26/ direct evidence of it.

Monsanto did hold that a resale-price agreement could not be proved by "ambiguous evidence." 27/ This does not mean, however, that circumstantial evidence is precluded. It simply means that evidence of a termination following complaints does not alone provide unambiguous direct or circumstantial evidence of a price-fixing agreement. This is so because perfectly innocent interpretations are also possible, as illustrated by the cases discussed in Section II above.

C. There Is No Factual Support for a Presumption of Illegality When a Dealer Is Terminated After Complaints

It has been argued that a price-fixing conspiracy is the only logical explanation when certain kinds of discount houses, like those that sell wearing apparel, are terminated after complaints by full-price retailers. 28/ It is true that the basic rationale for a selective distribution system,

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26/ 780 F.2d at 1219. See also Black Gold, Ltd. v. Rockwool Industries, Inc., 732 F.2d 779 (10th Cir.)(on rehearing), cert. denied, 105 S. Ct. 178 (1984)(circumstantial evidence sufficient).

27/ 465 U.S. at 763.

28/ Milstein supra n.22, at 4-5.

articulated in Sylvania, applies most obviously to technologically complex products that require extensive point-of-sale information services. For those kinds of products, it is clear that a discounter can take a "free-ride" on the expensive sales efforts of a full-price outlet. When the product is not complex, some claim that no "free rides" are possible and that therefore a manufacturer has no legitimate reason to terminate a discounter. This is not so.

Even if consumer products are not technologically complex, there are good reasons a retailer would ask a manufacturer to terminate a discount outlet and why a manufacturer would do so -- reasons that do not involve price-fixing conspiracies. In the first place, the retailer may simply want an exclusive arrangement, or something closer to an exclusive arrangement, and as shown above, the antitrust laws normally allow it. In the second place, the opportunity for a discounter to take a "free-ride" exists even when non-complex products like clothing are involved, and this is a matter of legitimate concern both to a manufacturer and a full-service outlet.

Pre-sale services can involve a lot more than explanations of a complicated product by a knowledgeable sales

clerk. 29/ Among other things, dealers may provide expensive display space in centralized locations where customers can browse with convenience and in comfort. By contrast, discount clothing stores may have minimal sales staffs and no private dressing rooms. The assurance of quality that is provided when a high-grade outlet stocks a particular brand is also a service to consumers, as is the assurance of fashionability for certain items, like clothing, where these things are important.

It also costs money for retailers to provide non-technical resale services of this kind, and discounters can take a "free ride" on these expenditures. If there is any doubt about it, consider the obvious benefits a discounter enjoys when apparel it carries is sold at higher prices in fashionable stores. Does anyone suppose that these clothes would have the same appeal to customers if they were not also sold in more expensive stores? It is not surprising at all that the higher-priced stores may get upset about this situation from time to time, and there is no reason to suspect that they have an illegal price agreement with apparel manufacturers just because they complain and the manufacturers respond.

29/ For a discussion of the "free-rider" problem in sales of non-complex products, see T. Overstreet, Resale Price Maintenance: Economic Theories And Empirical Evidence 56-62 (FTC Staff Report 1983).

These are real-world facts of life, not just esoteric theories, and it is the real world that Monsanto has addressed.

D. The Monsanto Decision Does Not Threaten the Survival of Discount Merchandisers

The witnesses who testified in support of S. 430 predicted dire consequences if the bill does not pass. One went so far as to state "that unless Congress acts quickly we will witness the loss of a great many retail discounters." 30/ This is absurd.

The Monsanto decision did not undercut the per se rule against price fixing. It simply reaffirmed a principle that is almost as old: namely, a manufacturer's right to select the people with whom it does business. Discounters have thrived, even though some manufacturers do not want to deal with them, because many more are eager to do so.

In fact, discount houses prospered even when resale price maintenance was entirely legal in many jurisdictions. From 1937 to 1975, so-called "fair trade" contracts, which required adherence to resale prices, were legal if authorized by state law. From 1952 to 1975, some states permitted a manufacturer to enforce resale price restrictions against all dealers in the state, so long as it had the agreement of just

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30/ First, supra n.14, at 5 (April 23, 1987).

one. 31/ The discount industry began its explosive growth in that environment, which should have been far more threatening than the post-Monsanto climate. As one witness conceded:

> The discount retail industry has enjoyed explosive growth in the last two decades. Indeed, studies indicate that the dollar volume of sales made by surveyed discount stores increased by 3400% from 1960 to 1985. 32/

The discount industry in the United States is immense. Attached to this statement is a list of publicly traded discount companies taken from a recent issue of a trade publication. 33/ It is naive to think that the Monsanto decision will have any material impact on stores with the buying power of K-mart, Wal-Mart, Federated Department Stores, and many others on this list. It is also naive to think that consumer bargains will disappear in the wake of the Monsanto decision.

31/ When fair-trade laws were invalidated by passage of the "Consumer Goods Pricing Act of 1975", 89 STAT. 801 (1975), 26 states had fair-trade statutes and 10 had so-called "non-signer" clauses. See T. Overstreet, supra n.29, at 5.

32/ Statement of Robert Verdisco for National Mass Retailing Institute at 3 (April 23, 1987). Indeed, it has been estimated that even in the era of fair-trade laws, less than 10 percent of the goods sold in this country were subject to resale-price contracts. Overstreet, supra n.29, at 6-7.

33/ Discount Store News, Feb. 2, 1987, at 61.

E. If Lower Courts Have Misapplied Monsanto, The Supreme Court Can Fix It

It is unclear whether S. 430 has been primarily prompted by the Monsanto decision itself or by supposed misapplications of Monsanto in lower courts. The bill's principal sponsor said that since the Monsanto decision, "there has been considerable confusion" and that "[s]ome lower courts' interpretations of what evidence a plaintiff must present under Monsanto run counter to traditional conspiracy law. . . ." 34/ If subsequent decisions have indeed misapplied Monsanto, however, it is not necessary to overturn the decision as S. 430 would do. The fact is that the three decisions which have been particularly criticized -- Garment District, Sharp and LA-Z-BOY 35/ -- have certiorari petitions pending in the Supreme Court right now. We do not know enough about the facts of those cases to know whether the lower court decisions are correct, but if the decisions are wrong, the Supreme Court has an opportunity to correct them.

There obviously is some ongoing tension between the principles of Dr. Miles, which dates from 1911, and the

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34/ Statement of Sen. Metzenbaum, supra n.3.

35/ Garment District, Inc. v. Belk Stores Services, Inc., supra n.20; Business Electronics Corp. v. Sharp Electronics Corp., supra n.27; McCabe's Furniture, Inc. v. LA-Z-BOY Chair Co., 798 F.2d 323, (8th Cir. 1986), petition for cert. filed, 55 U.S.L.W. 3495 (U.S. Jan. 20, 1987)(No. 86-1101).

principles of Colgate, which dates from 1919. The Supreme Court has to resolve the tension in this area of antitrust, as in others, in light of contemporary problems and contemporary understanding. The Supreme Court took on that task when it decided Monsanto just three years ago, and the decision was unanimous. The lower courts are just beginning to respond, and some lower court decisions may well be wrong. This is not a sufficient reason for Congress to overturn the Monsanto decision itself.

Conclusion

The advocates for S. 430 purport to agree that a manufacturer is entitled to choose its own dealers, but they have a totally unrealistic idea of what freedom of choice means. For these witnesses, apparently, the only free choices are those made without consideration of anyone else's opinions or likely reactions. Choices of that kind are not free; they are simply uninformed.

It is rarely sensible for a manufacturer to sell indiscriminately to all comers. When a manufacturer sells a product to a dealer, it is usually buying a package of services at the same time, and the manufacturer has to decide which dealers will be able and willing to provide those services most

effectively. 36/ A dealer's ability and willingness to provide services may well be affected by the identity and business strategies of other competitive dealers. Dealers are apt to have strong views on these subjects; they express them; and sometimes a manufacturer has to choose between one dealer and another -- or between one mode of distribution and another. It is not reasonable simply to presume, as S. 430 would, that there is an underlying price-fixing arrangement whenever one of these confrontations arises. Moreover, a manufacturer's freedom of choice means nothing unless it can be exercised in light of the real-world alternatives that are available.

S. 430 is not necessary to preserve the per se rule against resale price maintenance. The Supreme Court did that in Monsanto. S. 430 is not necessary to correct interpretations of Monsanto in lower courts that are arguably wrong; the Supreme Court can do that too. S. 430 is not necessary to preserve the discount industry; that industry has demonstrated its ability to thrive even if resale price maintenance were legal, which it is not.

In short, S. 430 will not serve any useful purpose. What it will do is ensure that a substantial number of ordinary

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36/ As discussed above, the service that a manufacturer pays for may involve a lot more than the instruction of potential purchasers of complex equipment; it may also mean the maintenance of an environment that makes it pleasant to shop and that contributes to the "image" the manufacturer wants.

business decisions, which have no effect on competition, become the subject of antitrust litigation.

This Subcommittee should reject S. 430.

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Discount Industry Chain Stock Analysis Table

Exch	Company	Ticker Symbol	Closing Price 1/5/87	Closing Price 1/19/87	Net Change in Period	Per Cent Change in Period	P/E Ratio	Earnings Per Share Last 12 Months	Annual Dividend Rate	Annual Dividend Yield	52-Week High	52-Week Low
NYS	Alexander's	ALX	43.00	43.50	0.50	1.16	128	0.65	0.00	0.00	49.00	34.50
NYS	Ames Dept. Stores	ADD	23.25	22.25	– 1.00	– 4.30	20	1.12	0.10	0.45	34.63	19.25
OTC	W. Bell	BLLW	4.00	4.38	0.38	9.50	d	– 0.82	0.00	0.00	8.50	3.88
NYS	Best Products (L)	BES	9.63	8.38	– 1.25	– 12.98	d	– 1.56	0.24	2.86	16.38	8.38
NYS	Burlington Coat	BCF	24.63	21.88	– 2.75	– 11.17	15	1.47	0.00	0.00	26.50	15.88
NYS	Circuit City Stores	CC	32.13	30.75	– 1.38	– 4.30	23	1.33	0.06	0.20	34.25	12.25
OTC	C.O.M.B.	CMCO	22.75	22.25	– 0.50	– 2.20	d	– 0.12	0.00	0.00	38.00	7.13
OTC	Comp-U-Card	CUCD	13.75	18.00	4.25	30.91	67	0.27	0.00	0.00	23.75	11.25
NYS	Consolidated Stores	CNS	14.88	16.13	1.25	8.40	39	0.41	0.00	0.00	23.63	7.50
NYS	Cook United	QCCF	2.38	2.25	– 0.13	– 5.46	d	– 0.58	0.00	0.00	3.25	2.25
OTC	Crazy Eddie	CRZY	9.88	8.25	– 1.63	– 16.50	15	0.55	—	0.00	21.63	7.63
NYS	Dayton Hudson	DH	43.38	43.38	0.00	0.00	15	2.89	0.92	2.12	58.50	40.00
OTC	Dollar General	DOLR	13.63	13.13	– 0.50	– 3.67	26	0.50	0.20	1.52	24.13	12.13
NYS	Family Dollar	FDO	17.00	16.88	– 0.12	– 0.71	16	1.06	0.28	1.66	28.13	15.38
NYS	Fed. Dept. Stores	FDS	85.63	87.50	1.87	2.18	15	5.82	2.68	3.06	100.38	63.50
OTC	Federated Group	FEGP	6.38	6.38	0.00	0.00	21	0.29	0.00	0.00	20.00	6.13
NYS	Gordon Jewelry	GOR	20.38	19.25	– 1.13	– 5.54	16	1.24	0.52	2.70	22.50	16.38
ASE	Grand Auto	GAI	23.50	23.25	– 0.25	– 1.06	211	0.12	0.00	0.00	24.13	15.75
ASE	Grossman Bros.	GMN	9.75	8.38	– 1.37	– 14.05	d	– 0.27	0.00	0.00	26.38	8.25
NYS	Hack's Inc.	HEX	11.63	11.50	– 0.13	– 1.12	d	– 1.73	0.00	0.00	17.25	10.00
OTC	Highland Superstrs	HIGH	19.25	16.50	– 2.75	– 14.29	10	1.35	0.00	0.00	39.25	15.75
ASE	Home Shopping Nat. (H)	HSN	37.25	53.00	15.75	42.28	90	0.29	0.00	0.00	65.00	12.63
NYS	Jamesway	JMY	24.25	24.00	– 0.25	– 1.03	18	1.52	0.12	0.50	31.00	10.00
NYS	Jewelcor	JC	10.63	11.13	0.50	4.70	14	0.81	0.00	0.00	20.25	9.50
NYS	K mart	KM	46.38	47.50	1.12	2.41	20	2.72	1.48	3.12	57.38	33.63
NYS	Kroger	KR	30.50	30.75	0.25	0.82	16	1.95	1.05	3.41	35.00	21.38
NYS	Lucky Stores	LKS	27.13	26.38	– 0.75	– 2.76	21	1.18	—	0.00	37.88	23.25
ASE	L. Luria & Son	LUR	11.00	11.50	0.50	4.55	18	0.63	0.00	0.00	15.13	8.75
OTC	Luskins	LUSK	5.00	4.75	– 0.25	– 5.00	—	—	0.00	0.00	14.50	3.75
OTC	Mars Stores	MXXX	5.38	5.38	0.00	0.00	d	– 0.04	0.00	0.00	17.00	4.63
NYS	May Dept. Stores	MA	37.25	40.13	2.88	7.73	16	2.33	1.04	2.59	44.13	30.00
NYS	Melville Corp.	MES	55.75	58.13	2.38	4.27	14	4.27	1.76	3.03	73.75	48.63
ASE	Neiman-Lauis.	NLI	12.25	12.88	0.63	5.14	15	0.88	0.00	0.00	19.00	8.25
ASE	Nichols (S.E.)	NCL	8.13	8.00	– 0.13	– 1.60	13	0.61	0.00	0.00	12.63	7.00
OTC	Oshmans Sport Goods	OSHM	13.88	14.00	0.12	0.86	17	0.81	0.20	1.43	23.25	13.25
OTC	Pace Member. Whses.	PMWI	8.63	9.00	0.37	4.29	d	– 0.44	0.00	0.00	21.00	7.50
OTC	Pay 'n Save	PAYN	5.75	6.00	0.25	4.35	—	—	0.00	0.00	16.13	5.13
NYS	Pep Boys	PBY	42.38	46.88	4.50	10.62	32	1.47	0.22	0.47	48.25	25.13
NYS	Perry Drug Stores	PDS	13.13	14.00	0.87	6.63	24	0.59	0.22	1.57	20.88	12.00
OTC	Pic 'N' Save	PICN	23.50	23.13	– 0.37	– 1.57	22	1.05	0.00	0.00	30.38	17.63
OTC	Present Co.	PR_T	5.63	6.50	0.87	15.45	10	0.67	0.00	0.00	11.38	5.25
OTC	Price Company	PCLB	36.50	35.50	– 1.00	– 2.74	27	1.25	0.00	0.00	55.75	28.25
OTC	Rose's Stores (cl A)	RSTO	16.50	20.00	3.50	21.21	9	1.17	—	0.00	23.00	10.25
OTC	Rose's Stores (cl B)	RSTOB	16.00	20.75	4.75	29.69	9	1.17	—	0.00	23.25	11.38
OTC	Service Merchandise	SMCH	7.88	8.38	0.50	6.35	d	– 1.20	0.08	0.95	15.13	6.75
NYS	Stop & Shop	SHP	51.25	51.88	0.63	1.23	18	3.29	1.10	2.12	61.75	39.13
OTC	Strawbridge & Clothier	STRW	40.50	40.25	– 0.25	– 0.62	14	2.92	0.93	2.31	63.50	37.00
OTC	Stuarts Dept. Stores	STUS	7.25	7.75	0.50	6.90	12	0.62	0.00	0.00	18.75	6.25
NYS	Super Valu Stores	SVU	25.25	25.38	0.13	0.51	22	1.07	0.42	1.65	27.88	19.75
NYS	Syms	SYM	12.00	11.63	– 0.37	– 3.08	17	0.68	0.00	0.00	14.75	10.25
NYS	Toys "R" Us	TOY	31.50	32.25	0.75	2.38	36	0.97	0.00	0.00	34.50	22.00
NYS	U.S. Shoe	USR	21.13	22.63	1.50	7.10	26	0.83	0.48	2.03	27.25	18.50
NYS	Wal-Mart Stores	WMT	47.88	47.75	– 0.13	– 0.27	34	1.41	0.17	0.36	53.88	29.75
OTC	Warehouse Club	WCLB	3.88	4.25	0.37	9.54	d	– 0.25	0.00	0.00	11.25	3.00
OTC	Wholesale Club	WHLS	5.75	5.00	– 0.75	– 13.04	d	– 0.77	0.00	0.00	9.50	5.00
NYS	Zale Corp.	ZAL	50.25	49.63	– 0.62	– 1.23	d	– 2.12	1.40	2.82	50.25	28.63
NYS	Zayre Corp.	ZY	25.00	26.13	1.13	4.52	18	1.43	0.32	1.22	43.88	20.75

Key: (H) = New high in period (L) = New low in period (d) = Deficit NYS = New York. ASE = American. OTC = Over the counter.

Source: Nelson International Inc., Boulder, Colo.

Executive Director
William R. Hutton
Washington, DC

National Council of Senior Citizens

President
Jacob Clayman
Silver Spring, MD

925 Fifteenth Street, N.W. • Washington, D.C. 20005 • (202) 347-8800

June 4, 1987

The Honorable Howard M. Metzenbaum
Chairman
Antitrust and Monopoly Subcommittee
140 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

The National Council of Senior Citizens (NCSC) strongly supports S. 430, the Retail Competition Enforcement Act of 1987, which you introduced together with Senators Rudman, Simon, and Bradley.

Previous Republican and Democratic administrations have enforced the law against vertical price fixing, which has been per se illegal for over 75 years. This Administration, on the contrary, has not only failed to enforce the law, but has also intervened in court cases trying to overturn the per se prohibition against vertical price fixing. It is, therefore, essential that the per se rule be codified to eliminate confusion resulting from the Administration's intervention.

NCSC believes that consumers should have the freedom to buy products or services at the best possible price--at full-price stores or in discount stores at lower prices. Surveys by your own staff indicate that a household can save as much as 30 percent by shopping for consumer goods in discount stores. The opportunity to stretch one's income is especially important for the elderly whose incomes generally are not easily responsive to changes in economic conditions. It seems odd that this Administration, which has deified freedom of choice should abandon this objective when it applies to consumers.

What makes S. 430 particularly important is that some lower courts have misinterpreted a 1984 Supreme Court case dealing with the amount of evidence necessary to prove the existence of a vertical price-fixing conspiracy. S. 430 can go a long way in clarifying the evidentiary standards.

We hope that your Committee will act favorably and promptly on this important consumer bill.

Sincerely,

Jacob Clayman
President

JC/G/wa2

First Vice President, Dr. Mary C. Mulvey, Providence, Rhode Island Second Vice President, George J. Kourpias, Washington, DC
Third Vice President, Dorothy Walker, Detroit, Michigan Fourth Vice President, Everett W. Lehmann, Washington, DC
Secretary-Treasurer, Jack Turner, Detroit, Michigan General Counsel, Robert J. Mozer, New York

STATEMENT OF DIANNE M. NAST
ON BEHALF OF MEMBERS OF THE ANTITRUST
COMMITTEE, LITIGATION SECTION,
AMERICAN BAR ASSOCIATION
TO THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

RE: S.430

I am a director and shareholder of the firm of Kohn, Savett, Klein & Graf, P.C., 2400 One Reading Center, 1101 Market Street, Philadelphia, Pennsylvania. I have had extensive antitrust practice, representing both plaintiffs and defendants.

I have also served a three year term as co-chairman of the American Bar Association Litigation Section's Antitrust Committee, and am currently a member of the Litigation Section's Council. This statement is present to summarize the views of the Antitrust Committee of the Litigation Section with respect to S.430.

Committee members were surveyed to ascertain their views with respect to S.430. I have reviewed the opinions offered about the proposed legislation by committee members and, while there are some dissenting viewpoints, the majority supports S.430 and does so enthusiastically.

Most committee members believe that Senator's Metzenbaum's bill will, if adopted, go a long way toward clearing up the uncertainties which have arisen in the wake of Monsanto. Senator Metzenbaum's keen observation on the Justice Department's predeliction to intervene as amicus on behalf of defendants advocating the overruling of resale price maintenance rules is well-founded. Indeed, the Department's apparent adversarial posture to the current law in the resale price maintenance arena underscores the need for legislation that will codify the long-standing principle that vertical price-fixing is per se illegal and that will make clear the evidentiary standard for establishing the existence of vertical price-fixing agreements.

A number of committee members expressed concern that the law on vertical price-fixing and the evidence needed to establish it has been adequately addressed over time by the courts and that Monsanto reasonably augments the proof needed to substantiate an unlawful vertical restraint conspiracy.

The prevalent view, however, is one of relief that S.430, as one member put it, "will help prevent judges who do not believe in enforcement of the antitrust laws from usurping the jury's role of deciding whether a manufacturer has conspired to maintain resale price levels."

In fact, our committee has observed that in the face of a skeptical court, proving a vertical agreement can be nearly impossible. As one Committee Member observed, Justice White, in a dissent to the Supreme Court's recent decision in a predatory pricing conspiracy case, noted his grave concern with the court's reliance on Monsanto in expanding the scope of a judge's traditional summary judgment inquiry:

> If the court intends to give every judge hearing a motion for summary judgement in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probably than not, it is overturning settled law.

Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. _____ (1986).

The committee majority concurs with Senator Metzenbaum's assessment of post-Monsanto court decisions as making vertical price-fixing, already clandestine by nature, "extremely difficult to prove" with "victims of illegal behavior... not compensated for their losses, and future illegal conduct...not deterred."

In conclusion, the majority of the members of the Antitrust Committee of the ABA's Litigation Section believes that the proposed legislation is worthy of enactment.

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